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David L. Faigman
UC Hastings College of the Law, faigmand@uchastings.edu

Author: David L. Faigman

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MADISONIAN BALANCING: A THEORY OF CONSTITUTIONAL ADJUDICATION

*David L. Faigman**

* Professor of Law, University of California, Hastings College of the Law. I would like to extend my heartfelt thanks to my colleagues who read early drafts of this Article. Particularly deserving of my gratitude are Alex Aleinikoff, Larry Alexander, Dick Fallon, Dan Farber, Calvin Massey, John Monahan, and Scott Sundby. Special thanks also go to my research assistants, Julius Erolin and Clare Holihan, for their tireless efforts.

INTRODUCTION

In constitutional cases, the Supreme Court's adjudicative task requires it to define the values inherent in the text,[1] find the facts that fit into the context established by these values,[2] and, ultimately, integrate these values and facts in a satisfactory manner. In this endeavor, neither the values contained in the text nor the facts of the world are known with certainty. The daily business of the Court, therefore, involves crafting certain decisions under conditions of uncertainty. The Court has addressed this quandary by increasingly relying on a balancing methodology that purportedly accounts for the indeterminacy of the enterprise.[3] This solution has been criticized, however, for permitting the Court to ignore counterfactual information and to subtly evade making explicit its controversial policy choices.[4] But the critics' appraisals of constitutional balancing are correct only up to a point. The error in the Court's constitutional adjudication lies not in the balancing methodology itself, but in how the Court employs that methodology. Done faithfully, balancing provides the most effective method available by which to interpret the Constitution.[5]

This Article offers a method by which constitutional values and constitutional facts can be successfully integrated through a process I refer to as "Madisonian Balancing." Madisonian Balancing does not receive its label due to any recently discovered documents indicating James Madison's embrace of the balancing method. In fact, the eighteenth-century Madison probably would have been surprised by many of the ideas that I, and others, ascribe to him today. Madisonian Balancing takes shape out of the essential structure of American constitutional democracy. While I cannot claim that Madisonian Balancing is specifically

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[1] *See* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988).

[2] *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991). *See generally* Henry Wolfe Bikle, *Judicial Determination of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 135 U. FLA. L. REV. 236 (1983); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988).

[3] Professor Henkin eloquently described balancing's allure: "It provides bridges between the abstractions of principle and the life of facts. . . . It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree." Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978).

[4] *See* HUGO L. BLACK, A CONSTITUTIONAL FAITH 50-52 (1968); El Paso v. Simmons, 379 U.S. 497, 517, 528-33 (1965) (Black, J., dissenting); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[5] *See also* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

mandated by the American constitutional system, compared to the alternatives, it best exemplifies the objectives and spirit of that system. My goal is to describe the most meticulous and conscientious method for adjudicating constitutional cases. My primary concern is constitutional *adjudication*, not constitutional *interpretation*.[6] I focus on the constitutional method and, in particular, offer a procedure by which varying normative principles can be integrated into variable factual information.

Today, constitutional adjudication is in a state of disarray. This situation is largely attributable to the Court's failure to articulate consistent, normative constitutional contexts in which to place constitutional facts. The Court regularly evidences complete confusion, utter indifference, or simple ignorance about fact finding in constitutional cases.[7] For example, in *City of Cleburne v. Cleburne Living Center*,[8] the Court *invalidated* a government regulation under *rational basis review* because there was no evidence to support it; in *Burson v. Freeman*,[9] in contrast, the Court *upheld* a government regulation under *strict scrutiny review* because there was no evidence against it. And in *Planned Parenthood v. Casey*,[10] in the course of the same opinion, Justices O'Connor, Kennedy and Souter upheld a 24-hour waiting period and invalidated a spousal notification provision, though the quantum of evidence was virtually the same as to whether either posed a "substantial obstacle" to the exercise of the abortion right.[11] Madisonian Balancing offers a firm footing for the currently "rootless nature"[12] of the Court's constitutional adjudication.

This Article proposes a balancing method that fully accounts for the values and facts inherent in the constitutional clash between individual liberty and government interests. Madisonian Balancing begins with the premise that a constitutional injury caused by some government action cannot be described in a piecemeal fashion. An infringement of a due process property right, for example, has greater constitutional significance when it also infringes freedom of speech. A court's evaluation of the constitutionality of a challenged government action must entail a full

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6 By this statement, I do not mean to join the debate over whether "adjudication is interpretation." *Compare* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982) ("Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text.") *with* Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1987) ("[A]djudication is *not* primarily an interpretive act of either a subjective or objective nature; adjudication, including constitutional adjudication, is an imperative act.") (emphasis in original). Although my proposal clearly has relevance to this debate, enumerating the specific ways it does so must await another day.

7 *See* Faigman, *supra* note 2, at 577-88.

8 473 U.S. 432, 448 (1985).

9 112 S. Ct. 1846, 1856 (1992).

10 112 S. Ct. 2791 (1992).

11 See *infra* note 206 for discussion of the empirical research relevant to this question.

12 *Casey*, 112 S. Ct. at 2878 (Scalia, J., dissenting).

assessment of the constitutional costs of that action. Madisonian Balancing thus operates with a Constitution-wide perspective, rather than from a right-specific or amendment-specific viewpoint. The metric by which individual liberty is to be balanced against government interests is constitutionality itself. The balance is struck at a transactional level, by comparing the depth of the full constitutional infringement with the government's justification for its action. Madisonian Balancing thus aggregates rights and then balances them against the government's interests, which have always been aggregated for balancing purposes.

As currently practiced, however, balancing is mired in a bog of indeterminacy. Madisonian Balancing combines two separate lines of thought that must be brought together to give some structure to balancing before it disappears into a constitutional muck. First, the foundational and relatively non-controversial assumptions of the Constitution provide the main support. I refer to this pillar as the Madisonian paradigm.[13] Specifically, the Madisonian paradigm refers to the dilemma upon which American constitutional democracy rests.[14] On the one hand, democratic majorities enjoy the fundamental right to rule as they desire, while, on the other, individuals receive protection from majoritarian interference in particular spheres. Any error in ascertaining the boundary between the majority's right to rule and a minority's legitimate right to be free of such rule results in tyranny. Whereas majoritarian interference with protected rights constitutes a tyranny by the majority, denial of the majority's power to rule in spheres not specifically protected constitutes a tyranny by the minority.[15] Courts are called upon to resolve the Madisonian dilemma by carrying out the primary task in constitutional adjudication of ascertaining and policing the boundary between the two tyrannies.[16]

The second pillar supporting Madisonian Balancing comes from an unlikely source—the common law of evidence. Evidence scholars have always concerned themselves with the integration of uncertain factual information into previously defined value systems. Evidence doctrine ex-

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13 *See* David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1526-34 (1992).

14 *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 22-24 (1956); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA 39-41 (1990) [hereinafter BORK (1990)]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) [hereinafter Bork (1971)].

15 Judge Robert Bork described the clash of principles as follows:

> Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution.

Bork (1971), *supra* note 14, at 3.

16 *Id.*

plicitly manipulates burdens of proof in order to allocate the risk of factual error. In contrast, although constitutional law has always depended on facts, the integration of facts into constitutional decisions remains, at best, implicit. The Court sometimes refers to burdens of proof when articulating constitutional doctrine,[17] but these constitutional forays into evidence nomenclature are rarely developed with any consistency or explanation of their jurisprudential basis. The common law evidentiary concept of burden of proof together with the concept of presumptions provide significant assistance in making plain the premises of constitutional argument. Together with the substantive value structure of the Madisonian model, the evidentiary procedural rules provide a viable plan for constitutional adjudication.

This Article thus proposes to construct, by employing insights from the Madisonian model and evidence law, a constitutional balancing methodology that is true to the underlying structure of the Constitution and addresses the problem of indeterminacy intrinsic to the task of integrating constitutional values and constitutional facts. Part I briefly explores the historical emergence of balancing as the ascendant method of constitutional adjudication. In the twentieth century, balancing has swiftly overtaken formalism as the preferred method of constitutional adjudication across the entire constitutional spectrum.[18] Part I further considers recent scholarly criticisms of balancing that call into question whether balancing has realized its promise and that contemplate a return to the halcyon days of formalism's predominance. This close inspection leads to the conclusion that balancing and formalism share the failing that they both permit the Court to achieve facile results, outcomes that seem more the product of divination or science than constitutional principle.

Part II introduces an evidentiary analogue into the basic Madisonian paradigm. In so doing, it provides a primer for the constitutional scholar on the evidentiary principles of burden of proof and presumptions. The evidentiary analogy furnishes the argument for adopting a constitutional balancing method with a much needed foundation of feasibility.

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[17] *See, e.g.*, Burson v. Freeman, 112 S. Ct. 1846 (1992), discussed *infra* notes 137-41 and accompanying text. *See generally* John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569.

[18] *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (First Amendment); Camara v. Municipal Court, 387 U.S. 523 (1967) (Fourth Amendment); Waller v. Georgia, 467 U.S. 39 (1984) (Sixth Amendment); Mathews v. Eldridge, 424 U.S. 319 (1976) (Seventh Amendment); Whitley v. Albers, 106 S. Ct. 1078 (1986) (Eighth Amendment); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Fourteenth Amendment); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (Commerce Clause); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) (Contract Clause); Supreme Court v. Piper, 470 U.S. 274 (1985) (Privileges and Immunities Clause); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Tenth Amendment); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (Separation of Powers).

Part III combines the Madisonian paradigm and the evidentiary analogue to construct a detailed strategy for constitutional balancing. It describes why Madisonian Balancing operates at the transactional level of analysis. Instead of balancing specific rights against the aggregate of government interests, as is now done, Madisonian Balancing includes the aggregation of implicated rights in order to compare the full liberty concern affected by a government action against the government's reasons for acting. Moreover, Part III explains how the procedural rules of the burden of proof and presumptions help clarify and formalize the balancing method. Finally, this Part contrasts the utility and efficacy of Madisonian Balancing with the entire spectrum of traditional constitutional methods and concludes that the spectrum should be replaced by the single method of Madisonian Balancing.

I. THE MADISONIAN TRADITION AND BALANCING

Inherent in the Madisonian paradigm is the clash of values between the majority's right to regulate and the individual's right to be free of majoritarian control. To resolve this clash, the Court has used a variety of methods, all of which fall upon a single spectrum. On one end stands formalism; on the other, ad hoc balancing. The use of formalistic methods dominated the Court's early constitutional history. In the twentieth century, balancing emerged as the constitutional method of choice. Balancing, however, has been criticized for failing to make any clearer than formalism the basis for constitutional decisions. This Part briefly recounts the historical shift from formalism to balancing and closely examines the contemporary critique of that move.

A. Historical Antecedents

As an explicit constitutional methodology, balancing is of relatively recent vintage.[19] However, balancing, as an implicit method, has long stood at the core of jurisprudential thought. Indeed, the concept of the "scales of justice" can be traced to ancient times.[20] Modern constitutional doctrine merely continues this balancing legacy. Indeed, the very foundation of the Madisonian system appears to contemplate balancing government power against the rights of individuals to be free of such power.[21] The large number and variety of constitutional contexts that

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19 *See* Aleinikoff, *supra* note 4, at 948.

20 *See* Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 19 (1988) (noting that Bulfinch describes Themis as "holding aloft a pair of scales, in which she weighs the claims of opposing parties") (citation omitted).

21 I am aware, of course, that saying that the Madisonian system contemplates this balance does not compel, or even necessarily suggest, the conclusion that the judiciary should be the balancer. But once we assume that the Court will enter the process and evaluate the constitutionality of the actions of the more political branches, a role designated in *Marbury v. Madison*, then the Court must account for the inherent character of the Madisonian paradigm. Indeed, as the guardian of the

merit balancing would seem to confirm the integral nature of the balancing method for constitutional interpretation. A brief glance back, however, belies this conclusion.

For much of the Court's history, the distribution of power between the government and the individual was deemed to have an absolutist character.[22] The government was empowered to operate in identifiable spheres while others remained beyond its reach. In the nineteenth century, the Court sought to remain faithful to the perceived intrinsic character of the Constitution by identifying the limits of government power through definition. The manifest core of the nineteenth-century methodology was a set of categories with which the Court attempted to demarcate the spheres of legitimate governmental activity. This method reflected the formalism of the time.

Not surprisingly, many nineteenth-century cases can be viewed through a modern lens as balancing cases. Our ability to interpret these cases as balancing decisions is a result, not of the altered nature of the clash between rights and interests, but of the change in our perception of that clash. What led to this result? The briefest answer is also the simplest. The formalistic strategy employed in these early cases increasingly strained against the categorical boundaries selected.

The Court's nineteenth-century experience interpreting the "negative implications" of the Commerce Clause provides an illuminating example.[23] The question presented is the scope of state power to regulate matters that touch interstate commerce. In *Gibbons v. Ogden*,[24] Chief Justice John Marshall drew the distinction between the states' legitimate police powers and their lack of power over interstate commerce.[25] In practice, however, the categories *police* and *commerce* proved unenlightening; they were merely conclusions that provided no explanation for the results they achieved.[26] These categories were eventually replaced by new categories fashioned in *Cooley v. Board of Wardens*.[27] In *Cooley*, the Court distinguished regulations that were inherently local and within the

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system, the Court cannot avoid employing the system's implicit operating assumptions. If the model contemplates striking a balance between majority will and individual liberty, the Court's role must include holding the scales. *See infra* notes 56-62 and accompanying text.

22 *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992).

23 The Commerce Clause states, in pertinent part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

U.S. CONST. art. I, § 8, cl. 3.

24 22 U.S. (9 Wheat.) 1 (1824).

25 *See* RUTH L. ROETTINGER, THE SUPREME COURT AND THE STATE POLICE POWER 10 (1957); *see also* HORWITZ, *supra* note 22, at 27-31.

26 *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937). *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 406 (2d ed. 1988).

27 53 U.S. (12 How.) 299 (1851).

state's power from regulations that were so national in character that uniform regulation was necessary. This categorization scheme wound up being as unenlightening as the one framed in *Gibbons* and was similarly abandoned.[28]

Whether the categories were police/commerce or local/national, formalistic analysis failed to provide sufficient explanation of the basis for decision. As the Court increasingly realized, state regulations of commerce did not have inherent qualities that could be categorized. These regulations were functions of intricate forces having complicated effects on the nation's economy.[29] In an effort to account for this complexity, the Court's Commerce Clause jurisprudence embraced the balancing method. In *Southern Pacific Co. v. Arizona*,[30] for instance, the Court evaluated whether the burden on interstate commerce was outweighed by the state's interest in the regulation. Balancing, however, has increasingly come under attack for failing to make any clearer than formalism the basis for decision and, possibly, creating more problems than it solved.

B. The Perils of Balancing

Critics of constitutional balancing decry the dangerous discretion afforded the Court. Justice Black particularly loathed its carte blanche potential.[31] Professor Henkin, a cautious admirer of balancing, summarized the critics' concern: "Its reasonableness and simplicity are seductive, the way it points is sometimes too easy, the answers it provides too uncritical."[32] Balancing seemingly permits judges enormous latitude in measuring values and facts for inclusion on the scales while, at the same time, purporting to be objective, neutral, and even scientific. Whereas formalism offers little explanation for decisions, balancing offers exhaustive reasons that, some argue, obscure the result as fully as formalism. The concern over the lack of checks on judicial balancers usually focuses on three main issues. First, balancing decisions contain an "unrealistic pretension to precision."[33] Second, balancing requires measurement of incommensurable factors on a common scale.[34] Third, balancing invites judges to second-guess legislative policy decisions and thereby assume a

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28 *See* TRIBE, *supra* note 26, at 409; *see also* Aleinikoff, *supra* note 4, at 950-51; Henkin, *supra* note 3, at 1038.

29 *See* HORWITZ, *supra* note 22, at 29-30.

30 325 U.S. 761, 770-71 (1945).

31 *See* El Paso v. Simmons, 379 U.S. 497, 517, 528-33 (1965) (Black, J., dissenting); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 164-67 (1961) (Black, J., dissenting); Konigsberg v. State Bar, 366 U.S. 36, 67-71 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 141-44 (1959) (Black, J., dissenting).

32 Henkin, *supra* note 3, at 1047.

33 Coffin, *supra* note 20, at 20. *See generally* Aleinikoff, *supra* note 4, at 992.

34 *See* Aleinikoff, *supra* note 4, at 972.

legislative capacity themselves.[35] Whatever the accuracy of these criticisms, abandoning balancing to return to formalism makes sense only if balancing suffers these weaknesses to a greater degree than formalism. This subpart evaluates the comparative worth of the balancing method against the alternative of formalism. This juxtaposition leads to the conclusion that traditional balancing is, at least, no worse than traditional formalism; Part III assumes the task of demonstrating the advantages that a modified balancing scheme offers as a constitutional method.

1. A "Pretension to Precision."—It is ironic that the principal criticism of balancing should be its false cloak of exactitude. In large measure, balancing arose as a pragmatic remedy to the failure of formalism to realize its reputedly inherent certainty.[36] Formalistic line-drawing sought to cabin in an absolute manner the principles of the Constitution. Only when judges realized the impossibility of locating the essential natures of constitutional issues did balancing arise to account for the ambiguity.[37] Legal formalism was a product of a scientistic era; balancing appealed to the minds of twentieth-century judges and scholars more accustomed to concepts of relativity, probability, and uncertainty.[38] Formalism is to balancing what Newton is to Einstein.

Balancing decisions are ambitious creations in that they seek to integrate multifarious principles with a multitude of facts. Very often, however, the premises and support for the factors drawn together in the balance are left unstated. The values used to calibrate the scales remain vague while the Court heaps upon the scales principles and facts in unspecified amounts. The elements placed on the scales are put forth as known quantities that must merely be measured in particular cases.[39] Professor Aleinikoff lamented this state of affairs:

> Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor ar-

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35 *Id.* at 984.

36 *Id.* at 949-51.

37 *See id.* at 952-54 (offering a three-pronged reason—the political, judicial, and academic—for this shift).

38 Justice Frankfurter's words reflect this modern mind set:

> Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.

Dennis v. United States, 341 U.S. 494, 524-25 (1951).

39 Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 18-25 (1987).

guments that can engage us; they are demonstrations.[40]

The error, according to Aleinikoff, is in the method.[41] The fairness of this objection to balancing must be measured by evaluating the effectiveness of formalism in exposing the mysteries of constitutional interpretation. As it turns out, formalism also shrouds the decisionmaking mechanism in mystery.

Formalism cloaks issues in certitude, hiding from the observer, if not the observed, the true basis for the decision.[42] In *Lochner v. New York*,[43] for example, Justice Peckham buried, or was ignorant of, the economic, social, and political factors that motivated his conclusion that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[44] Underlying the seemingly straightforward categorization of contract into liberty lay the empirical assumptions surrounding Herbert Spencer's Social Statics.[45] The constitutional category of "liberty" does not inexorably extend to the freedom to contract.[46] Placing the latter in the former's box without articulating the principles and values guiding that conclusion mystifies constitutional adjudication no less than the current balancing practices. Whereas balancing often entails the announcement of vast numbers of principles that combine to an inexplicable result, formalism often entails the announcement of a category without any principle that singularly leads to an inexplicable result.[47]

Both formalism and balancing strategies thus seem to permit the obfuscation of the principles and facts integral to a conclusion.[48] Of

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40 Aleinikoff, *supra* note 4, at 993.

41 *Id.*; *see also* Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 193 (1985).

42 Professor Schauer—a cautious admirer of formalism—noted this criticism:

> [O]ne view of the vice of formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the language of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently.

Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513-14 (1988).

43 198 U.S. 45 (1905).

44 *Id.* at 53.

45 Justice Holmes criticized the Court for constitutionalizing its world view:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Id. at 75 (Holmes, J., dissenting).

46 *See* Schauer, *supra* note 42, at 511-13.

47 *See* Mendelson, *supra* note 5, at 821 ("Doctrines are the most frightful tyrants to which men ever are subject, because doctrines get inside of a man's reason and betray him against himself.") (quoting W.G. Summer).

48 *Id.* at 825; *see* Guido Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428-30 (1979); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersection Between*

course, that balancing allows as much deception as formalism hardly recommends it as a constitutional method. But critics' attacks on balancing amount to an indictment of the users, not the method. The Court has employed balancing with a formalistic certainty that perverts the elegance of the method. It is as if balancers wished to deny the uncertainty of the constitutional enterprise; but balancing's strength derives from its explicit recognition that God does, indeed, "play dice" with the universe.[49] The quintessence of balancing as a constitutional method is its acceptance, indeed its celebration, of the uncertainty of values and facts in the constitutional firmament. The question whether balancing can provide a structure within which to comprehend this uncertainty is explored in Part III.

2. Lack of a Common Scale.—An often-repeated criticism of balancing is that the absence of a common scale by which to measure the multifarious rights and interests that must be balanced renders the entire enterprise chimerical. There are at least two versions of this criticism, typically referred to as the "apples and oranges" complaint.[50] The simplified version holds that rights and interests cannot be reduced to a single metric that would permit useful comparison. Reality undermines the surface appeal of this argument; apples and oranges are often compared on a common scale, such as weight, size, or subjective preference. Similarly, constitutional principles could be measured along a variety of unitary dimensions, such as efficiency, utilitarian cost/benefit ratios, and so on. However objectionable it might seem, measuring constitutional principles on a unitary basis is theoretically easy to imagine. The prospect of measuring constitutional cases along a single metric raises the more sophisticated version of the apples and oranges complaint: the absence of a single scale of values external to judges' policy preferences.[51] In this version of the apples and oranges complaint, the concern is disagreement over what metric to adopt, not the inability to locate a single scale. While the development of a single metric scale is theoretically straightforward, no particular metric appears constitutionally mandated or otherwise neutral.

This criticism, like the pretension of precision, afflicts all constitutional methods. Balancing cannot be faulted for failing to solve the puzzle that has preoccupied constitutional scholarship in the late twentieth

Law and Political Science, 20 STAN. L. REV. 169, 236-41 (1968); Grant Gilmore, *Law, Logic and Experience*, 3 HOW. L.J. 26, 37-38 (1957); Karl N. Llewellyn, *The Constitution As an Institution*, 34 COLUM. L. REV. 1, 17 n.29 (1934).

[49] This phrase alludes to Albert Einstein's famous comment concerning the import of such theories as Heisenberg's uncertainty principle, which indicate that the very nature of some events is probabilistic. *See* STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 56 (1988). Despite Einstein's disbelief, the principle of uncertainty forms one of the cornerstones of modern physics.

[50] Aleinikoff, *supra* note 4, at 972.

[51] *Id.* at 973; Frantz, *supra* note 4, at 1440.

century—the search for neutral principles.[52] The success of this search, and indeed the value of the excursion, are questions that transcend the balancing method. Criticizing balancing for failing to identify neutral principles confuses the *substantive* problem of value identification in constitutional interpretation with the *process* problem of integrating some identified values into factual contexts for purposes of adjudication. Balancing does not substitute for classic constitutional construction. The identity, nature, or even existence of principles, neutral or otherwise, must be ascertained separately from the balancing mechanism. The scales of justice merely provide a heuristic metaphor; the principles inherent in the Constitution give content to the metaphor.

Understanding the balancing method as insisting on a single quantitative scale over-literalizes the metaphor.[53] The constitutional balance need not speak in quantifiable units at all. Indeed, how could it? Most of the factors placed upon the scales are not quantifiable in any real sense. Constitutional factors such as deprivation of liberty, administrative necessity, expectations of privacy, exigent circumstances, value of speech, perpetuation of moral order, and so on, have no specific quantifiable referent.[54] (What price liberty?) So we should not expect our constitutional methodology to be able to measure them in strict quantifiable terms.

Although constitutional values do not lend themselves to a simple calculus, they are amenable to comparison and rough measurement on a single scale. To anticipate briefly the discussion of Part III, the single balancing metric is simply the nonquantifiable value of "constitutionality." To be sure, it is neither objective nor scientific; but it is *measurable*. For instance, we might not be able to say that one statute is "twice" as constitutional as another; but it is commonplace to refer to one statute as *more* constitutional than another.[55] Although, in this sense, the conclu-

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[52] *See* Herbert A. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16-17 (1959).

[53] *See* Coffin, *supra* note 20, at 20-21 (cautioning against taking the balancing metaphor too seriously).

[54] Although most constitutional factors cannot be reduced fully to quantifiable terms, many *are* defined in ways that permit quantification at least in part. For example, even if deprivations of liberty have an obvious subjective component, the length of the deprivation can be measured directly. The Court has struggled with the relevance of this issue in deciding the standard for reviewing proportionality of punishments under the Eighth Amendment. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Finney, 437 U.S. 678 (1978); Ingraham v. Wright, 430 U.S. 651 (1977); Weems v. United States, 217 U.S. 349 (1910). In fact, it is difficult to identify a constitutional issue that does not have some empirical component that, at least in theory, is measurable. *See* Faigman, *supra* note 2, at 607.

[55] While constitutionality is not strictly quantifiable, this construct can be conceived as lying upon a scale of measurement. The qualitative nature of the term does not prevent judgments that some state regulation is more or less constitutional than some other, despite our inability to say how much more or less. In mathematical terms, balancing uses an ordinal scale to measure constitutionality rather than a cardinal scale or a ratio scale. A ratio scale has a true zero, a fact which permits

sion derived through balancing lies on a single scale—constitutionality—myriad factors comprise this outcome. It is these factors that Madisonian Balancing draws in greater relief. The metric of constitutionality is particularly important to Madisonian Balancing, for the Madisonian balance is struck at the Constitution-wide level. On one scale is placed the full liberty concern and on the other is placed the government's reasons for infringing that liberty. The result is measured in constitutional units.

3. Judges as Legislators.—The final criticism of balancing objects that this method transforms judges into legislators.[56] Complaints of a legislative judiciary are at least as old as judicial review itself and thus cannot, in their simplest version, be associated uniquely with balancing. The sophisticated version of this complaint, however, is not limited to balancing judges usurping the power of the political branches, but instead holds that the balancing method resembles too closely the method used by legislators. This view posits that the process of micro-weighing the costs and benefits to segments of society is a legislative task that the Court illegitimately duplicates when using a constitutional balancing methodology.[57] The obverse of this point, of course, is that legislators do not reason formalistically, so that when judges do so they reason differently than legislators.

The belief that legislators do not think formalistically is so obviously erroneous that it almost needs no discussion. It might be said, however, that a legislator's formalism is different in kind than a judge's. A legislator constructs rules relying on sundry political factors that go beyond the legitimate purview of judges. A legislator's formalism is built on a political foundation of special interests and unarticulated premises unavailable to judges. Hence, a legislator's formalistic thinking, though it resembles a judge's, differs fundamentally by virtue of the premises used

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comparisons such as "twice as much." A cardinal scale has no true zero, but the points of measurement are the same distance apart along the scale. An ordinal scale is numerically calibrated, but only for purposes of ordering some construct from highest to lowest. The Fahrenheit scale is an example of a cardinal scale; it has no true zero, so it would be incorrect to say that 100 degrees is twice as hot as 50 degrees. The Kelvin scale, in contrast, does contain a true zero and thus, as do all ratio scales, permits such comparisons. Minerals can be ordered in terms of their relative hardness along Mohs's scale, an ordinal scale with "1" representing the softest mineral (*i.e.*, talc) and "10" the hardest (*i.e.*, diamond). The ordinal scale does not indicate how much harder one mineral is than another, just their order of hardness. N.M. DOWNIE & R.W. HEATH, BASIC STATISTICAL METHODS 7 (5th ed. 1983). Government actions might similarly be measurable on an ordinal scale of constitutionality.

56 *See, e.g.*, Kahn, *supra* note 39, at 5.

57 Professor Woolhandler makes this argument:

> Formalizing the process for judicial reception of legislative facts will increase the hegemony of pragmatic balancing at the expense of other processes of judicial reasoning. Increasing the influence of pragmatic balancing in judicial decisionmaking will make the judicial process look more like the legislative and administrative processes, and will undermine the legitimacy of the courts.

Woolhandler, *supra* note 2, at 121.

to support it. This is a persuasive argument as regards formalism; as it turns out, it is also persuasive as regards balancing.

To be sure, the balancing process evident in many constitutional decisions bears a close resemblance to legislative balancing. The premises that support that balancing, however, differ (or should differ) from those relied upon by legislators. For instance, consider a proposed law to impose a fifteen-day waiting period on all gun sales.[58] A legislator considering whether to vote in favor of the law is likely to balance a host of factors, including the scope of any constitutional right to bear arms in the Second Amendment, the effectiveness of the waiting period in keeping guns out of the hands of certain classes of people, the likely response of the N.R.A. at the next election, how the press will portray the vote back home, and so on. The legislator probably will weigh these factors in an unarticulated jumble and come to some defensible result, at least to her constituents. A court reviewing the constitutionality of this law will likely review some of the very same factors as the legislator. The court will not review all of the same factors, however, nor will it review them in the same manner.

Assuming a constitutional right to bear arms exists that is sufficient to support judicial scrutiny of the fifteen-day waiting period,[59] the court will evaluate this law very differently, even if it uses much of the same language. Obviously, like the legislature, the court will first consider the nature of the Second Amendment right. This is not surprising, since both the legislator and judge are sworn to uphold the Constitution. For the judge, this threshold determination has more significance than for the legislator. If the Second Amendment is implicated, but not deeply so, the balancing judge defers greatly to the legislative judgment. Some balancing occurs, but the undifferentiated weight of the democratic process requires the judge to accept uncritically the legislature's reasons for passing the law. Thus, the balancing court merely peers over the shoulder of the balancing legislature to ensure that the scales are not defective. In contrast, if the Second Amendment were deeply implicated, the balancing court would reweigh the factors a legislature could legitimately rely upon in order to ensure the accuracy of the result. Under such circumstances, the judge owes the legislator little or no deference.

Yet, even when the court steps up to the scales to weigh independently the right to bear arms against the government's interest in the waiting period, judicial balancing differs from legislative balancing. The legislator's choice of factors to place on the scales extends far wider than the court's.[60] A court is constrained in balancing by placing on the rights

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58 *See, e.g.*, CAL. PENAL CODE § 12071(b)(3)(A) (West 1992 & Supp. 1993) (misdemeanor for a dealer to deliver a firearm within 15 days of the application for purchase).

59 *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

60 *See* Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 51 (1992) ("[I]n most well-functioning legal

side of the equation only items mandated by the Constitution, however loosely conceived. And on the opposing scale, the court is limited to measuring the nature of the interests and the effectiveness of the means chosen to meet those interests, as posited by the government.[61] In assessing the weight of the implicated right, the court owes no deference to the legislature.[62] In reviewing the magnitude of the interest and the effectiveness of the action, the court relies on, but checks, the legislature's judgments, and in reading the result off the scales, the court is constitutionally obligated to exercise independent judgment. The judicial and legislative processes thus bear much resemblance, but the content, nature, and scope of the enterprise differ significantly.

The traditional criticisms of constitutional balancing thus take aim first at the lack of guidance it gives to judges and, second, at the perceived license it gives them to fill the Constitution with their idiosyncratic value choices. Balancing's weakness, then, lies in its seemingly inherent lack of structure, an absence that allegedly inhibits constitutional debate. The remainder of this Article is devoted to proposing a constitutional balancing scheme with a structure that satisfies balancing's critics, a composition that significantly enhances constitutional debate. Two essential components comprise all constitutional debates: constitutional values and constitutional facts. Madisonian Balancing seeks to draw both in fuller detail. The next Part offers a context in which to understand constitutional facts, the great forgotten component of constitutional adjudication.

II. INTEGRATING FACTS AND VALUES IN THE TRADITION OF THE COMMON LAW

Although fact finding commands a central position in constitutional adjudication, it occupies a remarkably small region of constitutional scholarship. Moreover, the Court manifests little understanding of, or regard for, the significance of fact finding to constitutional decisions. This neglect has resulted in inconsistency and incoherence in constitutional jurisprudence.[63] Since the principal object of Madisonian Balancing is to integrate constitutional facts with constitutional values, this Part, as a preliminary step, briefly describes the kinds of facts that arise

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systems, judges cannot consider factors that are properly part of the day-to-day work of administrators and legislators.").

61 Note that under rational basis review, the Court will sometimes provide a legitimate purpose when the government has failed to anticipate one.

62 *But see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 34-37 (1962). Paraphrasing and agreeing with James Bradley Thayer, Bickel observed: "[E]very action of the other departments embodies an implicit decision on their part that it was within their constitutional power to act as they did. The judiciary must accord the utmost respect to this determination, even though it be a tacit one." *Id.* at 35.

63 Faigman, *supra* note 13, at 1579-80.

in constitutional cases. The second subpart of this Part presents a primer on the evidentiary principles of burden of proof and presumption, principles that provide the essential insights to the integration of constitutional value and constitutional fact.

A. The Configuration of Facts

Professor Kenneth Culp Davis provided the classic dichotomy between two types of legal facts, what he referred to as adjudicative facts and legislative facts.[64] Adjudicative facts are facts particular to a dispute and are within the province of the trier of fact (the jury, or if there is no jury, the judge) to decide. Evidence rules were specifically designed to manage adjudicative facts. Legislative facts, on the other hand, are those facts that transcend the particular dispute and have relevance to legal reasoning and the fashioning of legal rules; judges are responsible for deciding questions of legislative fact. In contrast to adjudicative facts, the rules of evidence expressly do not apply to legislative facts.[65] This Article proposes to extend certain aspects of evidence doctrine to the enterprise of finding some kinds of legislative facts.[66]

Before making this argument, I must further refine Davis's legislative fact category into two subcategories, what I call *constitutional-rule facts* and *constitutional-review facts*.[67] Constitutional-rule facts are advanced to substantiate a particular interpretation of the Constitution. Constitutional-rule facts belong to the traditional sources of authority—the text, original intent, precedent, constitutional scholarship, and contemporary values—in establishing the *meaning* of the Constitution. Constitutional-rule facts, therefore, serve as authority supporting the Court's construction of the text. A straightforward example of a constitutional-rule fact can be found in *Gibbons v. Ogden*.[68] Chief Justice Marshall asserted that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."[69] Assuming the seriousness of this observation, at least as to America's current understand-

64 *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

65 *See* FED. R. EVID. 201(a) ("This rule governs only judicial notice of adjudicative facts."); FED. R. EVID. 201(a) advisory committee's note ("No rule deals with judicial notice of 'legislative facts.' ").

66 At the outset, I must alert the reader that this proposal has been rejected by several distinguished scholars. Professor Kenneth Culp Davis found rules of evidence "wholly inappropriate for legislative facts." Davis, *supra* note 64, at 403. More significantly, my former mentors, Professors John Monahan and Laurens Walker, have questioned the usefulness of the evidentiary analogy: "Clearly, an answer to the question of how courts are to deal with unsupported empirical assertions underlying a legal rule is not to be found by analogy with the procedures used to analyze unsupported social [*i.e.*, adjudicative] facts." Monahan & Walker, *supra* note 17, at 577. It remains to be seen whether the student can persuade the teachers that the situation is less clear than they presume.

67 *See* Faigman, *supra* note 2, at 551-56.

68 22 U.S. (9 Wheat.) 1 (1824).

69 *Id.* at 190.

ing, this factual observation is eminently testable. The history of the Constitution is replete with examples of constitutional-rule facts that have contributed to the meaning of that document.[70]

Constitutional-review facts, on the other hand, refer to facts that the Court must review under a pertinent constitutional rule in order to determine the constitutionality of the state's action. Constitutional-review facts are the most prevalent sort of constitutional fact and the type usually associated with fact finding in constitutional adjudication. The recent case of *Barnes v. Glen Theatre*[71] provides an apt illustration. Petitioner challenged an Indiana law barring public nudity as applied to nude dancing in the petitioner's club. The Court found that nude dancing was expressive conduct and thus "within the outer perimeters of the First Amendment, though . . . only marginally so."[72] An issue raised by this interpretation concerned the government's justification for its infringement of speech, whatever the depth of the right. Justice Souter, concurring, provided the factual justification for the government's action: "the statute is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity.' "[73] Because the First Amendment was implicated, the government's basis for acting became relevant. The connection between nude dancing and prostitution, sexual assaults, and general criminal activity were constitutional facts reviewable under the authority vested in the Court through the First Amendment.

It should be noted, finally, that constitutional cases often involve adjudicative facts—facts peculiar to the dispute and which must be examined under the pertinent constitutional rule. A clear example of constitutional-adjudicative facts can be found in the obscenity cases. Under the *Miller* test, juries determine whether particular materials are patently offensive or appeal to the prurient interest under local community standards.[74]

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[70] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 239 (1978) (setting the constitutional floor for jury size at six on the basis of empirical research on jury functioning with fewer than twelve members); Roe v. Wade, 410 U.S. 113, 163 (1973) (basing the parameters of the right of reproductive choice on medical technology); Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (basing a constitutional right to integrated schooling on the empirical fact that separate schools were not equal); Lochner v. New York, 198 U.S. 45, 61 (1905) (assuming equality of bargaining power between employer and employee as support for constitutional protection of liberty of contract); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (implicitly assuming that legislators would be less faithful to a written Constitution than judges as support for judicial review). For a more expansive discussion of these and other cases, see Faigman, *supra* note 2, at 556-64.

[71] 111 S. Ct. 2456 (1991).

[72] *Id.* at 2460.

[73] *Id.* at 2469 (Souter, J., concurring) (quoting Brief for Petitioners at 37, *Barnes* (No. 90-26)).

[74] *See* Miller v. California, 413 U.S. 15, 24 (1973).

B. Burdens of Proof and Presumptions: An Evidentiary Primer

The relevance of particular facts in the trial process depends on the provisions of the applicable substantive law. Whether the defendant had notice of a banana peel on the floor might be relevant in a negligence action but irrelevant in an action under a workers' compensation statute. The substantive law provides a normative framework within which to organize, understand, and evaluate facts. In many cases, parties to both civil and criminal actions assume responsibility for demonstrating the existence or nonexistence of certain facts. For instance, a plaintiff might have the responsibility to prove the defendant's negligence while the defendant might bear the responsibility to demonstrate the plaintiff's contributory negligence. In criminal actions, the state bears most of the responsibility for proving facts, though defendants frequently are responsible for some factual matters.[75] In order to control the course of proof in the trial process, courts employ procedural mechanisms that situate responsibility for coming forward with proof and designate the quantum of proof necessary to satisfy this responsibility. These procedural devices, in fact, reflect substantive policy choices regarding where the risk of error should lie upon completion of the very uncertain business of fact finding. The two devices used to allocate the risks of factual error are the burden of proof and the presumption.

1. Burden of Proof.—The somewhat ambiguous concept of the burden of proof actually comprises two separate terms: the burden of production and the burden of persuasion. Both are important to Madisonian Balancing. The burden of production refers to the placement of the initial burden on one of the parties to bring forward evidence sufficient for a reasonable fact finder to conclude that the pertinent fact is true. In civil cases, the party desiring to change the status quo normally bears the production burden, though this allocation may be reversed in order to effectuate some substantive policy. In criminal cases, the state nearly always bears the initial burden to come forward with sufficient evidence.[76] The production burden thus refers to the judge's responsibility to measure the evidence to ensure that it is sufficient to permit the trier of fact to decide the matter.

In contrast, the burden of persuasion refers to the confidence that the triers of fact must evince in their conclusion. The bearer of the burden of persuasion is ordinarily the same as that of the burden of produc-

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[75] *See, e.g.*, Medina v. California, 112 S. Ct. 2572 (1992) (statute placing burden of proof on issue of incompetency to stand trial in criminal case upon defendant did not violate procedural due process); Martin v. Ohio, 480 U.S. 228 (1987) (Ohio practice of imposing on defendant the burden of proving self-defense did not violate due process).

[76] In criminal cases the defendant will often bear the burden to produce evidence sufficient to demonstrate an affirmative defense such as self-defense or incompetence to stand trial. *See, e.g.*, Martin v. Ohio, 480 U.S. 228 (1987).

tion; the plaintiff usually assumes it in civil cases and the prosecution bears it in criminal cases. After all the evidence has been introduced, the trier of fact reaches a conclusion based on a standard of confidence, *i.e.*, a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. This spectrum, ranging from a tie-breaking standard to a standard as near certainty as possible, reflects the system's judgment of the consequences flowing from factual error. In most civil cases, the preponderance standard illustrates the system's indifference in the allocation of error between civil plaintiffs and civil defendants; but some tie-breaking mechanism is needed in these cases, and by custom the law has favored the status quo.[77] In contrast, the stringent beyond a reasonable doubt standard illustrates the strong systemic preference favoring the defendant when mistakes are made. Thus the well-known colloquialism: It is better to let ten guilty men go free than to convict one innocent man.[78]

2. Presumptions.—A second and important concept usefully borrowed from the common law of evidence is the presumption. Although a variety of evidentiary devices are labeled as presumptions, the only true presumption is the "rebuttable presumption."[79] Two forms of the rebuttable presumption exist: one shifts the burden of production, and the other shifts the burden of persuasion. The following discussion is limited to the two forms of the rebuttable presumption, what I refer to as the production-shifting and persuasion-shifting presumptions. These two forms of the presumption function similarly, though with quite different effects.

The basic principle behind the presumption is that proof of a basic fact or facts compels acceptance of a presumed fact unless the opponent demonstrates by some quantum of proof that the presumed fact is otherwise.[80] The production-shifting presumption provides that once the beneficiary of the presumption demonstrates the basic fact, the opponent bears the burden of producing some evidence disputing the presumed fact. The beneficiary of the production-shifting presumption, however, continues to bear the risk of nonpersuasion on the merits. In contrast, once the beneficiary of a persuasion-shifting presumption demonstrates

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77 CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 339, at 574-75 (John W. Strong ed., 4th ed. 1992).

78 *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 460 (1989).

79 MCCORMICK, *supra* note 77, § 342, at 578-79. Two other devices regularly labeled as presumptions are the permissive, or standardized, inference and the conclusive presumption. The former merely denotes a logical relationship between facts, such that knowing one fact increases the likelihood that another fact is true. The latter is a substantive rule of law whereby proof of one fact compels acceptance of a second fact; no amount of proof will suffice to rebut the presumed fact.

80 *See, e.g.*, FED. R. EVID. 301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.").

the basic fact(s), the opponent bears both the burden to produce evidence and the risk of nonpersuasion on the merits.

A typical legislatively created presumption, one that could be interpreted to shift either the production burden or the persuasion burden, will illustrate the mechanics of presumptions. The California legislature enacted the following presumption:

> (a) A man is presumed to be the natural father of a child if . . . :
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> (1) . . . the child is born during the marriage, or within 300 days after the marriage is terminated. . . .[81]

If this presumption shifts the burden of production, once the mother introduces sufficient evidence[82] to prove the basic fact of birth during the marriage or within three hundred days after the marriage was terminated, the alleged father must produce sufficient evidence disputing the presumed fact of paternity. If the alleged father is successful in producing this proof, the burden shifts back to the mother who now bears the burden of persuasion on the ultimate issue of paternity. If this presumption shifts the burden of persuasion, however, once the mother produces sufficient evidence of the basic fact, the alleged father assumes the burdens of production and persuasion to disprove the presumed fact.

The insights into integrating facts and values provided by the experience of the common law of evidence lend considerable clarity to the constitutional context. The next Part borrows many of these insights to construct a new way of conducting constitutional adjudication.

III. REPLACING THE SPECTRUM OF CONSTITUTIONAL METHODS WITH MADISONIAN BALANCING

Madisonian Balancing is a balancing process that explicitly incorporates burdens of proof and the insights of presumptions in order to allocate the responsibility between the parties to articulate and demonstrate both the principles and facts necessary to constitutional adjudication. Moreover, Madisonian Balancing assesses constitutional liberty against government interests on a transactional basis. Madisonian Balancing incorporates evidentiary constructs in order to assign responsibility for identifying and defining constitutional values and for finding and substantiating constitutional facts. This process embraces a formalistic element in that the categories implicated in particular cases initially establish the respective burdens of proof. This formalistic element provides guidance to the discretion incorporated into the constitutional text. Its use allows Madisonian Balancing to refrain from the free-for-all assessment of the social or economic good while avoiding the rigidity of

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81 CAL. CIV. CODE § 7004 (West Supp. 1993).

82 "Sufficient evidence" refers to the proof necessary such that a reasonable trier of fact could find that the alleged father was married to the mother and that the child was born during the marriage or within ten months of its termination.

categorical analysis; it allows a process of guided discretion. The categories of Madisonian Balancing are not right specific, however, and instead query the depth of the liberty concern infringed by the government action. The Madisonian balancer seeks to compare the full impact on liberty of a government action and weigh it against the justification for that action. This process requires a balancing court to aggregate rights.

A. Introduction: The Elements of Madisonian Balancing

This subpart explicates the essential components of the present proposal to reorient constitutional adjudication. Madisonian Balancing would alter conventional constitutional decisionmaking in two basic ways. First, it would shift the perspective of the balancer from an amendment-specific to a Constitution-wide focus. The balance would continue to be rights based, but the constitutional infringement would be measured on a transactional basis. The second core aspect of Madisonian Balancing is the incorporation of evidentiary concepts into constitutional adjudication in order to make plain the premises of constitutional argument.

1. Aggregating Rights: A Transactional Approach to Balancing.— Current balancing methods are right specific. This means that constitutional analysis involves, first, an itemization of the parts of the document that have been infringed, second, an assessment of the nature and scope of the respective infringements, and, finally, an individual balancing of each right against the interests that justify the government action. In practice, therefore, the Court routinely balances the same government interests against more than one right. In *Bell v. Wolfish*,[83] for example, the government justified its publisher-only rule, which prohibited inmates from receiving hardcover books that are not mailed directly from publishers, with its need to prevent contraband from entering the prison. The Court recognized that the publisher-only rule implicated both the First and Fourteenth Amendments. In separate sections of its opinion, the Court found that the government's security need outweighed the prisoners' First Amendment right and that the government's security need outweighed the prisoners' right not to be deprived of their property without due process of law.

Depending on how this practice is viewed, right-specific balancing tends either to undervalue the Constitution's guarantee of liberty or to double count the government's justification for infringing that liberty. For example, suppose that in *Wolfish*, if such things could be measured,[84]

[83] 441 U.S. 520 (1979).

[84] Although for purposes of illustration in this Part I give specific weights to constitutional rights and government interests, I cannot emphasize too strongly that I do *not* believe constitutional analysis permits quantification of values. Once again, this is not to say that rights cannot be measured; they can be—on an ordinal scale of measurement. *See supra* note 55.

the First Amendment right implicated weighs four constitutional units and the due process property right also weighs four constitutional units. And suppose further that the government's interest in *Wolfish* could be quantified at six constitutional units. By dividing the rights and weighing them separately against the government interest, the government's action passes scrutiny under conventional balancing. If the full weight of the constitutional infringement is assessed against the government action, however, the action would be deemed unconstitutional. The latter approach seems more consistent with the values, structure, and, indeed, common understanding of the Constitution.

The concept of aggregation already informs the calculation of the weight of government interests in conventional balancing tests. The Court assesses government interests on a transactional basis. The Court first describes the form of government action and, thereafter, explores the objectives that do (or might) support that action. Only then does the Court begin to disassemble the constitutional costs associated with the action by individually tallying the weight of the various rights implicated. If balancing is the constitutional method of choice, it is manifest error to aggregate the values on one side of the scales but not on the other.

Moreover, from the individual victim's perspective, the depth of a constitutional infringement does not depend on the specific source of the right. As long as the constitutional values implicated do not overlap, the infringement of one right, in fact, *adds to* the injury caused by the infringement of other rights. Returning to *Wolfish*, the prisoners suffer a greater constitutional injury when they are deprived of property that not only implicates their due process rights but also falls within the scope of the First Amendment. Depriving prisoners of books inflicts a greater constitutional injury than, say, depriving them of hobby sets. The government's justification should have to outweigh the full import of the infringement. To be sure, certain specific constitutional values can be found implicit in both the First and Fourteenth Amendments and, so, double counting must be avoided when aggregating rights. Madisonian Balancing does not anticipate conducting a simple amendment count when measuring constitutional rights. Madisonian Balancing requires an exhaustive and full evaluation of the depth and nature of the rights and interests on both sides of the scales.

In fact, the need to account for multiple rights when calculating the constitutional balance has been recognized in various constitutional contexts. The most notorious of these is *Griswold v. Connecticut*,[85] in which Justice Douglas, writing for the Court, identified the right of privacy as situated in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth

[85] 381 U.S. 479 (1965).

Amendments.[86] Of course, the Court and commentators alike have criticized *Griswold*'s unorthodox approach. But the error of *Griswold* did not lay in its aggregation of rights but, rather, in its failure to demonstrate that privacy could actually be found somewhere in the document. The criticism of privacy is that it does not exist in *any* amendment, not that it is illegitimate to locate it in several.

The concept of aggregating rights has influenced the Court's analysis in other contexts. In *Employment Division, Department of Human Resources v. Smith*,[87] for example, Justice Scalia expressly embraced the lesson that the nature of the Court's review changes when government action infringes more than one right: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[88] Justice Scalia, however, was criticized by the other Justices for creating such a "hybrid" right,[89] and the Court consistently insists on segregating rights for purposes of analysis.

Somewhat surprisingly, perhaps, the Court has never specifically explained its failure to aggregate rights, even in cases where it would seem necessary to do so. A classic example of this comes from *Ross v. Moffitt*.[90] In *Ross*, the respondent claimed that the Due Process and Equal Protection Clauses of the Fourteenth Amendment mandated appointment of counsel for discretionary state appeals and for applications for review in the Supreme Court of the United States. The Court observed that the two bases "each depend[ ] on a different inquiry which emphasizes different factors." The Court explained the differences as follows and proceeded to consider the claims separately without explanation:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding sections.[91]

The Court failed to contemplate the possibility that due process and equal protection might combine in a single context to require a different result than what might be reached if evaluated separately.

In fact, much of the Court's constitutional jurisprudence is consistent with aggregating rights. For instance, implicit in the Court's selec-

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86 *Id.* at 484.

87 494 U.S. 871 (1990); *see infra* notes 121-45 and accompanying text for a full discussion of *Smith*.

88 494 U.S. at 881.

89 *Id.* at 896 (O'Connor, J., concurring); *id.* at 908 (Blackmun, J., dissenting).

90 417 U.S. 600 (1973).

91 *Id.* at 609.

tive incorporation of the Bill of Rights into the Fourteenth Amendment's guarantee of due process lies the insight that drives the present proposal: liberty has content that transcends the specific categories of the Bill of Rights. As Justice Cardozo emphasized in *Palko v. Connecticut*,[92] determining that certain rights are incorporated "has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."[93] Despite our traditional myopia otherwise, liberty resists being cabined into discrete categories. The guiding principle of the incorporation doctrine itself contemplates a broader understanding: those rights are incorporated when they "have been found to be implicit in the concept of ordered liberty."[94] This test requires the interpreter to transcend a crabbed, compartmentalized view of the Bill of Rights. We know, not from any reading of the text, that free speech is a fundamental right but the right to a jury in a civil trial is not; yet the text of the Constitution states both rights equally emphatically. The content of the rights contained in the Bill of Rights comes from interpretations that transcend the document's specific words.

The fundamental lesson of the Bill of Rights is that liberty is really just one freedom, a freedom that is defined in various operational ways in that document. Indeed, the Ninth Amendment, whatever its substantive content, emphasizes how the blanket of liberty is woven from a single thread. Professor Randy Barnett described how the Ninth Amendment contains this very lesson: "Liberty rights define a boundary within which individuals and associations are free to do as they wish. Because the ways by which this liberty can be exercised are unlimited, it is impossible to enumerate specific rights that people possess."[95] Liberty has a richness, complexity, and multiplicity that resists simple compartmentalization or specific enumeration. It is expansive and must be compared with the equally expansive concept of government interests. The process of aggregating rights merely asks the ultimate constitutional question: what degree of liberty is infringed by the challenged government action? Madisonian Balancing requires that the government's purposes be measured against the individual's full liberty right.

2. Integrating Evidentiary Procedural Rules into the Madisonian Paradigm.—Madisonian Balancing is informed by the relatively simple premise that constitutional questions boil down to a choice between individual liberty and government interests. If these questions are not to become bald assertions of political preference or simply follow the ideological idiosyncracies of judges, the balancing method that reconciles lib-

92 302 U.S. 319 (1937).

93 *Id.* at 326.

94 *Id.* at 325.

95 Randy Barnett, *Foreward: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 626 (1991).

erty and government interests must be guided by some rules derived from general principles. The evidentiary concepts of burden of proof and presumptions provide such rules when they are informed by the Madisonian model.[96]

The Madisonian model, as previously noted, comprises two fundamental principles that inform American constitutional democracy, two principles that stand in irreconcilable conflict. The first principle, the majoritarian principle, embraces the core conception of democracy that majorities rule. The second principle, the rights principle, marks certain spheres of human relations as outside majoritarian control. Over time, if not from the start, these two principles have not been deemed equally fundamental.[97] The majoritarian principle predominates over the rights principle.[98] This privileging of one principle over the other opens the way for a procedural mechanism that can regulate these two principles when they collide. Indeed, some strategy is needed, for a mechanism must be available to break ties when the two principles are equally at stake. The evidentiary analogue provides courts with an effective instrument to keep inviolate the two fundamental Madisonian principles as they move through the labyrinth of constitutional adjudication.

The intuitive connection between the constructs of the burden of proof and presumption and the Madisonian model is simple and direct. Because the Madisonian model slightly privileges majoritarian will at the systemic level, the initial burden of production falls upon the challenger of the majoritarian action. The challenger's burden of production has two components: the challenger must demonstrate, to the satisfaction of a reasonable court, (1) that the government action infringed some constitutional liberty; and (2) the nature and scope of that liberty concern. Once the challenger has met this production burden, the burden should shift to the state to justify the infringement. Whether this shift switches the burden of persuasion or merely the burden of production depends on the nature of the constitutional liberty infringed. The government's burden has two components: the government must show (1) the legitimacy

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96 Use of shifting burdens of proof is by no means a novel concept in areas outside the common-law trial context. It is used as a standard device to allocate responsibility under the civil rights laws. *See, e.g.*, 42 U.S.C. § 2000e-2 (Supp. 1992) (originally enacted as § 703 of the Civil Rights Act of 1964). More importantly for the present thesis, perhaps, the essential insight of shifting burdens of proof informs constitutional adjudication under the Canadian Constitution. *See* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 187-95 (1992).

97 *See* Erwin Chemerinsky, *Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989).

98 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 16 (1991) ("The Constitution puts democracy first."); JOHN HART ELY, DEMOCRACY AND DISTRUST 7 (1980) ("[M]ajoritarian democracy is . . . the core of our entire [system]."); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4 (1980) ("[In] this nation's constitutional development from its origin to the present time, majority rule has been considered the keystone of a democratic political system in both theory and practice.").

and strength of its interest; and (2) the factual nexus between the government's interest and the action taken to achieve that interest.

The evidentiary analogy supplies constitutional analysis with an array of standards by which to measure constitutional liberty and government interests when they conflict. Once the challenger has met her burden of production showing that the government action implicates the Constitution, the allocation of the burden of proof and its strength depend on the nature and scope of the liberty concern. I propose four levels at which the challenger might demonstrate that the Constitution has been infringed: (1) marginally; (2) consequentially; (3) centrally; and (4) at its core. Infringements on the constitutional margins shift only the burden of production while those that are consequential, central, or at the core also shift the burden of persuasion, albeit at different standards.

Infringements on the Constitution's *margins* shift the burden of production to the state to explain how its action is related to a legitimate interest. Unlike under the current rational basis test, the state truly bears the responsibility to articulate a legitimate interest as well as the nexus between its action and this objective.[99] The challenger, however, bears the ultimate burden of persuasion to refute the legitimacy of the interest or, by empirical proof, the nexus between the interest and action. The challenger bears the burden of persuasion, after the government meets its burden of production, to show that the liberty concern *more likely than not* outweighs the government's justification.

The three remaining categories of constitutional liberty shift the ultimate burden of persuasion to the government. Once the challenger demonstrates the existence of a *consequential liberty concern*, the state must demonstrate that the weight of the interest, and the factual nexus between its action and that objective, *more likely than not* outweigh the liberty concern. When a *central liberty concern* is infringed, the state must show that its interest, and the factual nexus between its action and that objective, *clearly and convincingly* outweigh the liberty concern. Finally, when a *core liberty concern* is infringed, the government is required to show that its interest and the factual nexus between its action and that objective outweigh the liberty concern *beyond a reasonable doubt*.

Madisonian Balancing alters the focus of the balancing metaphor in important respects. Traditional balancing tests call upon courts, in a rather vague fashion, to compare the strength of the government's interest to the depth of a specific constitutional right. The tests, however, do not provide any mechanism by which this can be accomplished, nor do they account for the factual components inherent in the analysis. Madisonian Balancing clarifies and specifies the elements of the test. First, what is the nature and scope of the full constitutional infringement? Sec-

[99] *See infra* notes 174-85 and accompanying text (discussing the difference between the current rational basis test and the Madisonian Balancing alternative).

ond, when evaluating the strength of the government justification, with what degree of certainty do we know that the government's action achieves the articulated objective? Madisonian Balancing incorporates the common sense idea that the weight of facts must be discounted by the risk that they are false. For instance, the deterrent effect of capital punishment, as a government justification, gains weight the more confident we are that such a connection exists. Within the tiers of Madisonian Balancing, the Court must assess the importance of the government interest as well as the likelihood that the action truly accomplishes that interest. Together, the answers to these two inquiries establish the weight of the government justification for balancing purposes.[100]

Mississippi University for Women v. Hogan[101] provides a straightforward example of the explanatory value of the evidentiary procedural rules when a single constitutional right is involved. In *Hogan*, Justice O'Connor, writing for the Court, invalidated Mississippi statutes that limited enrollment in the Mississippi University for Women School of Nursing to women.[102] Although Justice O'Connor did not describe her interpretive method as incorporating shifting burdens, it reflects such an implicit understanding.

Initially, Mr. Hogan, the challenger of state action, assumed the burden to establish that the Equal Protection Clause applied to discrimination against men and did so to the same degree as it did to discrimination against women. Based upon the Court's precedents, the challenger had little difficulty establishing that gender-based discrimination against

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100 Although this Article develops the concept of Madisonian Balancing in the context of the clash between individual rights and government interests, it can be employed in other constitutional contexts in which balancing is used. In Dormant Commerce Clause cases, for instance, the Court balances the state's interest in health and safety against the burden the legislation puts on interstate commerce. Just as in the Eighth Amendment context, the weight of the state's justification depends on how confidently we know the facts on which it is based.

Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981), provides a useful example. Iowa passed a law banning the use of 65-foot double tractor trailers on its highways. Iowa claimed, among other things, that the justification for the rule was that longer trailers would increase the number of deaths on Iowa roads. The truck company argued first that the larger trucks were at least as safe as the smaller ones and, moreover, that the reloading and rerouting necessitated by the Iowa law would burden interstate commerce by leading to more accidents and deaths on the highways surrounding Iowa. Conducting a straightforward balance between the deaths claimed to be saved by the Iowa law versus the deaths claimed to be caused by the Iowa law, we must have some idea how sure we are of the respective sides' data. If Iowa alleges that its law avoids 100 deaths a year, with 25% confidence, and the truck company's data indicates the law will cause 50 deaths, with 90% confidence, the interstate burden is greater than the benefit to the state: expected benefit = avoidance of 25 deaths; expected burden = 45 deaths outside Iowa. The *weight* of the state interest depends not simply on the interest alleged, avoidance of 100 highway deaths a year, but also on how confident the Court is that the law will achieve this purpose. Contrary to ordinary practice, it is simply impossible to measure the weight of an interest underlying a government action without knowing the factual likelihood that the action will achieve the asserted interest.

101 458 U.S. 718 (1982).

102 *Id.* at 733.

men fell within the coverage of the Equal Protection Clause.[103] The challenger, however, further bears the burden to demonstrate the depth of the implicated right. Practically, this responsibility means that the challenger must ascertain the degree of scrutiny the Court will apply to the government's action. By the time of *Hogan*, a substantial line of authority had fixed the depth of the right at stake in gender-based discriminations as somewhere between highly suspect race-based classifications and mere economic regulations.[104] The former calls for strict scrutiny, the latter for rational basis review. The level of review dictated by the right at risk in *Hogan*, therefore, was an intermediate standard.

Just as in the evidentiary context, once the challenger meets his burden of production, the burden should shift to the state. The weight of the state's burden depends entirely on the nature of the right established through the challenger's proof. In *Hogan*, the challenger established the existence of a right sufficiently important that the burden of persuasion shifted to the state to justify its action: the state had to demonstrate that its discriminatory practice served an important governmental objective and was substantially related to the achievement of that objective.[105] In the lexicon of Madisonian Balancing, the challenger had demonstrated the existence of a central liberty concern.[106] The state's asserted objective was to remedy past discrimination against women. As a normative matter, the Court readily accepted the importance of this objective to the state's policymaking in the abstract.[107] In order to meet its burden of persuasion, however, the state also had to demonstrate the nexus between its asserted interest and its action. The Court found that Mississippi failed to meet this burden and, indeed, believed the state's plan would produce the opposite result: "[R]ather than compensate for discriminatory barriers faced by women, [Mississippi's] policy of excluding males from admission to the school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[108]

Although the evidentiary analogue proves enormously helpful in

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103 *Id.* at 724 ("That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review."); *see, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979).

104 *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

105 458 U.S. at 724.

106 Whether the right infringed in gender-based discrimination cases is a central right or some other can be debated separately. Madisonian Balancing does not provide an answer to this question; it merely focuses the question and dictates what to do when an answer is settled upon.

107 458 U.S. at 727. It should be noted that although the Court accepted the proposition that a compensatory purpose *could* "justify an otherwise discriminatory classification," the actual impact of the statute here undermined the state's argument that a compensatory purpose actually underlay the discriminating classification. *Id.*

108 *Id.* at 730.

clarifying the respective responsibilities of the parties in constitutional adjudication, the analogy is not perfect. In particular, the burden to be met in the evidentiary context is entirely empirical;[109] in the constitutional context, the burden is in part normative.[110] In *Hogan*, for example, the challenger met his production burden by synthesizing the traditional constitutional authorities—text, original intent, precedent, constitutional-rule facts, constitutional scholarship, and contemporary values—in order to define or interpret the particular right. Thus, the initial burden of production is an admixture of interpretation, normative values, and empiricism, brought together to *define* the Constitution.[111] In practice, constitutional construction does not require proof in the traditional evidentiary sense at all. Rather, the challenger must prove the existence and nature of the constitutional right that will serve as authority for judicial review of state action.[112]

If and when the burden shifts to the state, the burden of proof again requires value identification and empirical assessment, but now in a way that is closer to the trial context analogy. In *Hogan*, the normative component involved the government's asserted objective to remedy past discrimination. The burden on the government was to demonstrate that this was an important governmental objective. As a general proposition, "a State can evoke a compensatory purpose to justify an otherwise discriminatory classification."[113] In addition, the government also bore the empirical burden to demonstrate that its action was substantially related to the asserted objective. The government failed to persuade the Court of the empirical connection between its action and its objective.[114] The Court thus measures the weight or importance of the government interest as an abstract matter and reviews the empirical likelihood that the government action will accomplish the stated interest.

The combination of the normative and empirical in the state's obligation distinguishes it from the ordinary evidentiary burden of proof.

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109 Although, in the evidentiary context, the trier of fact's task is described as entirely empirical, in practice jurors most assuredly impose their values on their fact finding. This most clearly occurs when juries "nullify" the law by acquitting an obviously "guilty" defendant. *See generally* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51 (concluding that jurors should be instructed that they have the "power of nullification").

110 *See* Monahan & Walker, *supra* note 17, at 584.

111 For an exhaustive analysis of the difficulties inherent in integrating constitutional authorities, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

112 This burden is something like requiring a plaintiff to demonstrate the existence and scope of a law that makes her the beneficiary of a presumption. In some sense, of course, plaintiffs bear this responsibility. In the constitutional context, however, the interpretive task is less straightforward.

113 458 U.S. at 728. This general proposition is limited to only those cases where "members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." *Id.*

114 *See supra* notes 105-08 and accompanying text.

Satisfaction of the burden depends, therefore, on the combined strength of the normative interest and the force of the factual showing. The power of the test lies in its balancing of the state's complete case against the weight of the liberty concern as demonstrated by the challenger. In some instances, the normative interest alone might meet the requisite showing.[115] In others, no set of facts would satisfy the state's burden. Most of the time, however, satisfaction of the burden of persuasion will depend on the soundness of *both* the state's values and its empiricism. As will become clear, the balancing metaphor supplies the necessary device for combining the normative and the factual in constitutional adjudication.

Still, because the analogy is imperfect, it is potentially misleading. But using the language of evidence law should not produce significant confusion, for the law regularly uses similar terms in different contexts. In any event, the usefulness of the analogy far outweighs any risk. Moreover, to the extent that the analogy too strongly emphasizes the empirical aspect of constitutional adjudication, this result will only slightly offset the usual disregard of this component.[116] More likely, some time will pass before constitutional facts receive the attention they are due.

The use of the burden of proof and presumption alongside the balancing method enormously clarifies and tightens the traditional tests. Its power derives from making explicit many of the operating assumptions implicit in the old methodologies. Moreover, Madisonian Balancing alters the perspective by which courts reconcile government objectives and constitutional interests—the balance is conducted at a Constitution-wide transactional level rather than a right-specific level. The next subpart describes the mechanics of Madisonian Balancing in various traditional constitutional contexts.

B. Madisonian Balancing Across the Constitutional Spectrum

In order to demonstrate the heuristic value of—indeed, the need for—Madisonian Balancing, I must briefly retrace the ground I traversed in an earlier article.[117] The need for Madisonian Balancing arises out of certain basic errors endemic to much of contemporary constitutional adjudication. The Court fails to separate the two traditional prongs of constitutional adjudication: (1) the definition prong and (2) the application prong. The definition prong refers to the Court's interpretation of the *meaning* of the Constitution; in this prong the Court determines whether the Constitution has been infringed and the depth of any infringement. In the application prong, the Court applies the construction devised in

115 *See infra* notes 137-41 and accompanying text (discussing Burson v. Freeman, 112 S. Ct. 1846 (1992)).

116 *See* Faigman, *supra* note 2, at 581-84.

117 Faigman, *supra* note 13, *passim*.

the first prong to the issues presented in the case before it. This analysis ordinarily requires the Court to review the government's reasons for infringing a covered right to determine if that infringement is justified. The Court, however, regularly uses government interest analysis in the process of *defining* the Constitution instead of evaluating those interests when *applying* the Constitution.[118] By not differentiating the two prongs of constitutional adjudication, the Court places the burden of disproving both the rationale and empirical basis of the government regulation on the challenger.[119]

The Bill of Rights was created to stand as a bulwark against majority tyranny. The scope and parameters of that bulwark thus must be defined independently of the majority's will. Fundamental to the American system is the belief that constitutional limits on the desires of the majority are recognizable independent of those desires. As Professor Dahl explained, to allow the majority to decide "whether the punishing of some specified act would or would not be tyrannical . . . is precisely what Madison meant to prevent, and moreover would make the concept of majority tyranny meaningless."[120] If the Bill of Rights operates as a bulwark against majority tyranny, the majority's reasons for acting cannot define what actions constitute tyranny.

The following section reviews a range of recent Supreme Court cases in order to illustrate the strength of Madisonian Balancing and to respond to a series of objections that might be raised to this method. It is organized around the spectrum of constitutional methods, which ranges from the most formalistic categorical method to the most extreme form of conventional, ad hoc balancing. Across the entire spectrum, the Court has violated the basic operating premises of American constitutional democracy. Madisonian Balancing provides clarification across the spectrum and, indeed, replaces the entire range of methods with a methodology that itself incorporates the values inherent in the old spectrum.

1. Category-Definition.—In *Employment Division, Department of Human Resources v. Smith*,[121] Justice Scalia applied his long preferred constitutional method of formalistic category-definition[122] to the Free Exercise Clause of the First Amendment. The *Smith* Court considered whether Oregon could constitutionally deny unemployment benefits to an American Indian dismissed from his job for the "religiously inspired" use of peyote.[123] Justice Scalia framed the issue in *Smith* as involving the

118 *Id.* at 1540-47.

119 *Id.*

120 DAHL, *supra* note 14, at 24.

121 494 U.S. 872 (1990).

122 *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

123 494 U.S. at 874.

scope of the Free Exercise Clause.[124] He concluded that the Clause was *not* implicated, primarily because of the government's need to uniformly regulate controlled substances[125] and concern over the effects of subjecting all similar government regulations to the rigors of the compelling interest standard.[126] Scalia thus *defined* the Free Exercise Clause to exclude religiously inspired peyote use largely on the basis of the state's pressing need to regulate drug use in a uniform manner.[127]

Scalia's conclusion that, under the circumstances, the Free Exercise Clause was not implicated resulted in only the most cursory review of the government's action. *Smith* illustrates an extraordinary instance of a violation of the basic Madisonian lesson to keep straight the two prongs of constitutional adjudication. Scalia used the strong reasons the government offered to justify its action to determine that the Free Exercise Clause does not extend to this case. In effect, he removed the burden from the government to justify its action and placed it on the challenger to refute the government's justification. As Justice O'Connor pointed out in her concurrence, it is simply incredible to believe that religiously inspired use of peyote does not even implicate the Free Exercise Clause.[128]

Madisonian Balancing provides a more cogent and intellectually forthright structure of decisionmaking. The initial inquiry in *Smith* puts the burden of production on the challenger to demonstrate that the Free Exercise Clause extends to his use of peyote. This would entail an exploration of the historical context and contemporary content of the Clause and engage the Court in a thorough analysis of the free exercise right. Madisonian Balancing, however, would not permit any discounting of the right through consideration of the government's reasons for acting, except insofar as the clause itself invokes government will.[129] This being the case, it is difficult to deny that the Free Exercise Clause is at least implicated in *Smith*.

The challenger also bears the responsibility, inherent in the burden of production and the Madisonian paradigm, to describe the depth of the liberty concern at stake, an obligation that establishes the burden of per-

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124 *Id.*

125 *Id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' ") (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

126 *Id.* at 888 ("If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.").

127 *See* Faigman, *supra* note 13, at 1540-41.

128 494 U.S. at 893-94.

129 Certain provisions of the Bill of Rights might be interpreted as invoking governmental discretion to provide the parameters of the right. The most often cited example is the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See* Faigman, *supra* note 13, at 1551-55.

suasion, if any, the government will bear at the application stage. At this point Madisonian Balancing confronts the central interpretive questions of constitutional law. What principles to apply, neutral or otherwise, and what level of generality (or specificity) to fix must be ascertained in order to define the depth of Smith's right to use peyote in his religious practice. I will make no attempt to provide a definitive answer to these questions here; instead, I explore the manner in which Madisonian Balancing incorporates this great values debate in its process. It must be emphasized that Madisonian Balancing provides no panacea for constitutional interpretation. Its value lies in making constitutional choices clearer, not easier; in fact, its greatest contribution lies in making constitutional choices more difficult by forcing the Court to actually make choices. In *Smith*, in particular, the most trenchant criticism of Scalia's majority opinion and O'Connor's concurring opinion concerns their failure to grapple with the core issues at stake.[130]

O'Connor's concurring opinion exemplifies the Court's failure to answer the difficult questions and, ultimately, reflects the value of Madisonian Balancing. As previously noted,[131] O'Connor challenged Scalia's definitional prong conclusion that religious use of peyote does not implicate the Free Exercise Clause.[132] O'Connor, moreover, believed that the Clause was deeply implicated, for she argued that the government's reasons for infringing the right must be "compelling."[133] In the lexicon of Madisonian Balancing, this means the challenger had met his burden of production and had described the depth of the liberty concern as reaching either a central or core level; the burden thus shifted to the government, whose burden of persuasion required a clear and convincing showing—if not proof beyond a reasonable doubt—that the government's interest and the action taken to achieve that interest outweigh the liberty concern.

O'Connor concluded that the government's reasons were indeed compelling. The very significant drug problem in the United States and the commitment to a "war" on drugs necessitated uniform drug laws that justified infringements of even deeply held constitutional rights.[134] O'Connor, however, failed to fully examine the government's argument. The government's burden of persuasion in *Smith* had two components, one normative and one empirical. O'Connor cited the strength of the government's normative position but completely ignored the important empirical basis for its action. The government introduced *no* empirical evidence of the drug problem in general or, more importantly, of the

130 *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

131 *See supra* note 89 and accompanying text.

132 494 U.S. at 896 (O'Connor, J., concurring).

133 *Id.*

134 *Id.* at 904.

relationship between the general drug problem and the necessity of enforcing uniform drug laws with no provision for good faith religious use of peyote.[135] It is not obvious that carefully drawn exceptions to the drug laws for religious use of certain controlled substances would lead to greater drug use in society. Perhaps there is an empirical connection. If the government did bear the burden of persuasion to demonstrate this connection, its unsupported assertions were insufficient to meet it.

By its own terms, then, O'Connor's definition of the Free Exercise Clause should have led to a fuller examination of the government's justification for its action. Madisonian Balancing, however, might not have led her ineluctably to a different result. It is the nature of balancing that it permits fine tuning so that one's conclusions are consonant with one's considered judgments. At the same time, the basis of such conclusions is made explicit, because the methodology makes it very difficult for the Court to hide its premises. Ultimately, the single metric of the balancing scales is constitutionality, a subjective conclusion that is the product of the weighing of various objective and subjective factors.[136] If O'Connor's considered judgment is that the government is justified here, Madisonian Balancing allows her to identify the specific basis for that belief. And by making this basis explicit, it permits others to challenge her judgment with particularity.

O'Connor has two alternative responses to the Madisonian critique. First, she could say that the free exercise right is not quite as important as she initially thought and, therefore, the burden of persuasion on the government is not very substantial. Of course, this assertion would require her to confront squarely the nature and scope of the Free Exercise Clause, an inquiry about which reasonable people can disagree. But any discounting of the Free Exercise Clause in this case would have a ripple effect through First Amendment jurisprudence. This is a step that, we can hope, she would take cautiously. Madisonian Balancing focuses the Court's attention squarely on the tough issue of defining liberty. If O'Connor wants to remove the burden to produce empirical research from the government, she will have to rationalize dilution of a fundamental right using the traditional authorities of constitutional interpretation. The value of the process lies in forcing her to confront this question.

Alternatively, O'Connor could argue that while the right is indeed fundamental, the government's asserted basis is so strong that requiring empirical support is unnecessary. Just last term, in *Burson v. Freeman*,[137] the Court advanced this logic when it upheld Tennessee's prohibition on campaign activity within 100 feet of an entrance to a polling place. Although the law was reviewed under the strict scrutiny standard,

135 *Id.*

136 *See* Coffin, *supra* note 20, at 25 ("What balancing does not do, even when done superbly, is eliminate all subjective forces from decision.").

137 112 S. Ct. 1846 (1992).

the Court did not demand any empirical evidence of the effectiveness of the law due to the strength of the government interests involved: "[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question."[138] The government interest in *Burson* was one of constitutional dimensions and of fundamental importance to a democracy: "the right to cast a ballot in an election free from the taint of intimidation and fraud."[139] Similarly, O'Connor could believe that the drug problem so threatens society that even the slightest prospect of exacerbating it by permitting religious use of controlled substances is sufficient to outweigh even deeply held rights.[140] The greater the asserted harm, under this argument, the less need for empirical support. The nature of balancing recognizes the cogency of this argument; yet again, O'Connor would be forced to examine its power on the merits. Drug use does present a significant societal problem that might alone justify many government actions. As written, O'Connor's opinion leaves the reader unconvinced that the speculative increase in drug use that might follow exceptions for religious purposes is of such major proportions that merely its prospect outweighs the exercise of a fundamental right.[141]

Whereas Justice O'Connor might quibble with aspects of Madisonian Balancing, Justice Scalia can be expected to object to it on at least two fundamental grounds, both of which stem from his preference for categorical tests. First, he has argued repeatedly that when laws of general application incidentally impinge upon fundamental rights, the Court should not scrutinize the basis for the government's action.[142] Second, Scalia finds that very often the value of categorical tests lies simply in their bright lines, lines that are predictable and which lower courts can follow consistently.[143] These arguments merit consideration.

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138 *Id.* at 1856 (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986)).

139 *Id.* at 1858.

140 Directly contrary to her approach in *Smith*, Justice O'Connor joined Justice Stevens's *Burson* dissent criticizing the "plurality for blithely dispens[ing] with the need for factual findings." *Id.* at 1863. Indeed, Justice Stevens's criticism in *Burson* applies just as well to O'Connor's opinion in *Smith*:

> [A]lthough the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation . . . it nonetheless upholds the statute because "there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place. . . . This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State*. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

Id. at 1866 (emphasis in original); *see* Faigman, *supra* note 13, at 1544-45 & n.83.

141 *See* McConnell, *supra* note 130, *passim*.

142 *Smith*, 494 U.S. at 878; Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring).

143 *See* Scalia, *supra* note 122, at 1186-87.

If the government's interest in uniform application of the laws outweighs the exercise of a fundamental right, then the government can regulate accordingly. But the existence and nature of the *right* does not depend on the strength of the government's interest. The right exists irrespective of the government's need to regulate it. Scalia achieves at the front door of definition what he fears to confront in the living room of application. Scalia's so-called categorical method balances as much as any balancing scheme; the difference is that Scalia's strong majoritarian preference results in a balance loaded in favor of the government.

Justice Scalia also strongly values categorical tests for their virtue of predictability.[144] Assuming that categorization increases predictability, a plausible assumption in many cases, much can be said for bright line tests and their administrative convenience. Madisonian Balancing does not deny the merit of bright line tests; it does, however, demand that their merit be demonstrated in particular contexts. For instance, in Fourth Amendment cases, administrative warrants might be determined not to require probable cause or a warrant.[145] This result might follow from the conclusion that, together with other government interests, the need for a clear test that government agents can follow outweighs the privacy interest infringed in these cases.[146] Similarly, some bright line tests will weigh in favor of an individual right, notwithstanding the presence of substantial government interests.

Madisonian Balancing is, in many respects, faithful to and incorporates many of the virtues of categorical tests. It begins by requiring the challenger to fit herself into a specific liberty category. Only once this is accomplished is the government called upon to justify its action, and the strength of this demand varies in direct relation to the nature and scope of the defined liberty concern. Madisonian Balancing thus contains a categorical threshold, a gateway defined by constitutional principle rather than speculative government interests. Categorical tests are inadequate because they cannot capture the nuances and subtlety of principle that balancing can. Traditional balancing tests fail because they do not contain the structure and fortitude of principle that formalism does. Madisonian Balancing borrows the virtues of both these methods.

2. Traditional Balancing Methods.—The purported value of the definitional method, or formalism, is that it forces the interpreter to determine what is in particular categories and what is out. It appears that once you step on the slippery slope of balancing, the great benefit of

144 *Id.* at 1179.

145 *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 534 (1967). *See generally* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

146 *Camara*, 387 U.S. at 537-38.

designating what is out begins to be lost; and as you move toward ad hoc balancing all is lost. Even the most ardent admirers of balancing lament the loss of some category definition.[147] This section challenges the assumption that balancing necessarily leads to uncertainty and unpredictability in constitutional adjudication.[148] In particular, it explores the ways in which Madisonian Balancing brings clarity to the traditional balancing tests that now wander in a fog of their own creation.

(a) Definitional balancing.—Professor Nimmer advocated the method of definitional balancing in First Amendment speech cases as a compromise between an impractical absolutist approach and the free-for-all of ad hoc balancing.[149] Definitional balancing offers the security of formalism and the flexibility of ad hoc balancing. It assesses the individual right against the government interests at a high level of abstractness in order to develop whole categories or spheres of protected activity. These categories provide the Court with shelter that ad hoc balancing could not against the incessantly shifting winds of politics.[150] In practice, however, definitional balancing blurs the distinction between the definitional prong and the application prong and permits great sloppiness in the balancing process.[151]

The quintessential instance of definitional balancing in the First Amendment involves state regulation of obscene materials. In *Roth v. United States*,[152] the Court held that "obscenity is not within the area of constitutionally protected speech or press."[153] This conclusion is ambiguous, and this ambiguity has clouded subsequent cases in this area. On the one hand, this conclusion could mean that obscenity is *covered* by the First Amendment but, in light of the strong government interests, it is not protected. This understanding fully incorporates both prongs of constitutional analysis. On the other hand, the *Roth* conclusion could mean that obscenity is not speech at all and thus not within the broad coverage of the First Amendment. The latter interpretation seems to describe

147 *See* STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 101-08 (1990).

148 Justice Scalia makes his assumption to this effect explicit:

> We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that these modes of analysis be avoided where possible; that the *Rule* of Law, the law of *Rules*, be extended as far as the nature of the question allows.

Scalia, *supra* note 122, at 1187 (emphasis in original).

149 MELVYN NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-2 (Student ed. 1984).

150 *See* SHIFFRIN, *supra* note 147, at 11 n.14.

151 Faigman, *supra* note 13, at 1555-63.

152 354 U.S. 476 (1957).

153 *Id.* at 485.

Roth itself and is the better explanation for cases following *Roth*.[154]

In *Roth*, the Court expressly declined to require any "proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct."[155] By effectively defining obscenity out of the category of speech, the Court perceived no need to evaluate the strength of the government interests. Yet, it is the government interests themselves that led the Court to define speech so as not to encompass obscenity. At bottom, the case against treating obscenity as speech depends on the deleterious effects obscene material has on those reading or viewing it.[156] Because the Court analyzed the government's interest in the effects of obscenity in the definitional prong, it effectively placed the burden of proof on the challenger to disprove any empirical connection between obscenity and deleterious societal outcomes.[157]

Madisonian Balancing substantially clarifies the choices presented in the First Amendment obscenity context. First, the challenger bears the burden of production to demonstrate that obscenity is within the broad purview of free speech. Once again, this raises the question of the scope of speech, or free speech, in the First Amendment, a substantive debate

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154 In R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), Justice Scalia, writing for the Court, noted the ambiguity created by statements like the one made in *Roth*:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

Id. at 2543 (citations omitted) (emphasis in original). Justice Scalia's description of the First Amendment's coverage conforms well with Madisonian Balancing. As a description of what the Court itself has been doing in the First Amendment area for the last 35 years, it does not tell the full story.

Justice White, joined by Justices Blackmun, O'Connor and Stevens, concurred in the Court's judgment but specifically rejected Justice Scalia's reading of the Court's First Amendment cases:

> Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are "not within the area of constitutionally protected speech." . . . The present Court submits that such clear statements "must be taken in context" and are not "literally true." . . .
>
> To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.

Id. at 2552 (White, J., concurring in the judgment); *see* Faigman, *supra* note 13, at 1557-62.

155 *Roth*, 354 U.S. at 486.

156 *See, e.g.*, Paris Adult Theater I v. Slaton, 413 U.S. 49, 58 (1973) ("[T]here is at least an arguable correlation between obscene material and crime.").

157 The Court has explicitly argued that this empirical burden lies with the challenger: "It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." *Id.* at 60. But the very conclusion that obscene speech is *not* an exceptional case protected by the Constitution hinges on the empirical uncertainties underlying the state legislation.

beyond the scope of this Article. However, it also raises the issue of the practicability of fully separating, for analytical purposes, the definitional prong from the application prong in Madisonian Balancing. Specifically, given the inordinate ambiguity of constitutional interpretation, does placing the burden of production on the challenger of state action help clarify this state of affairs?

The first and most obvious benefit of Madisonian Balancing is that it identifies the party responsible for constructing the meaning and depth of the allegedly infringed right(s). In the speech context, this might be a relatively significant burden to bear.[158] It also keeps distinct for analytical purposes the definition of speech from the government's reasons for the regulation. In the speech context, this has proven to be a significant challenge to meet.

The speech context presents special problems. For instance, the challenger of an obscenity statute might very well point out the impossibility of distinguishing obscenity from pornography with regard to their speech aspects; also, much of obscenity looks like or sounds like speech, despite the assurances of some that they know it when they see it.[159] Complicating matters still further, many forms of speech, such as perjury, fraud, and securities violations, have never been traditionally understood as within the coverage of the First Amendment.[160] Madisonian Balancing thus seemingly presents the rather unpleasant prospect of sending constitutional analysis careening down the slippery slope into a brick wall.

A particularly worrisome hypothetical might be the radical political dissident who assassinates the President in order to protest American foreign policy.[161] Can this expressive action be deemed speech within the coverage of the First Amendment? Traditional constitutional analysis answers with an emphatic no.[162] But the explanation for this result rests

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158 *See* Bork (1971), *supra* note 14, *passim*.

159 *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (Although he could not offer an "intelligible" definition of hard-core pornography, Justice Stewart concluded that "I know it when I see it.").

160 *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 132, 239-80, 315-21 (1989).

161 *See* SHIFFRIN, *supra* note 147, at 101-02.

162 *Id.* Professor Shiffrin asks this very question but contemplates a rather different answer than the one I offer:

> Suppose, for example, that a person thoroughly alienated from the culture and life within it commits an act of mass murder, such as spraying machine gun fire into a random crowd of people. The act of mass murder might be the product of and a manifestation of the person's dissent against the culture, and any good psychiatrist might find it to be highly revealing and expressive. But no one, so far as I am aware, would argue that this act is "expression" or "speech" for First Amendment purposes.

Id. at 101-02. If nude dancing is expression or speech, then acts of violence might also be similarly described. Shiffrin's error lies in allowing his *definition* of speech to be affected by the government's *justification* for infringing speech. As Professor Schauer has emphasized, "It is especially important . . . to distinguish between activities that are within the scope of the First Amendment and those that

on the obvious and overwhelming government interest in criminalizing this activity, not its lack of an expressive component. Madisonian Balancing would reach the same result in the political assassination hypothetical, but with less legerdemain. The political assassination would fall within the broad parameters of the First Amendment, but it would not be protected. To be sure, the government would seem to bear a substantial burden of persuasion on the issue of its interest in regulating assassinations. After all, in the definitional prong analysis, an assassination committed to make a political statement falls within the very core of the Amendment.[163] Are the government interests compelling enough to outweigh this right? Just to pose the question, of course, is to answer it.[164]

In other contexts, however, the strength of the government's interest and the nexus between the regulation and the accomplishment of that interest will be less easily demonstrated. In many contexts, such as laws against perjury, fraud, conspiracy, and antitrust violations, the government will have somewhat more difficulty satisfying its burden.[165] As the gravity of the harm decreases, the government's obligation to demonstrate empirically the connection between its action and the removal of the harm increases. In some cases, such as perjury, fraud, and conspiracy, the harm is significant and the relationship is fairly clear so that the government will readily meet the substantial burden necessary to justify its regulation. In other contexts, however, the burden might loom as a greater obstacle to overcome.

The obscenity/pornography context illustrates how the state's burden might increase as it is clarified under Madisonian Balancing. As noted above, because the Court effectively defines obscenity as nonspeech, it eschews any obligation to review the empirical basis for the government's regulation of these materials. Accepting the argument that obscenity constitutes speech would bring into sharper relief the government's reasons for its regulation. In the first place, this analysis would require a more searching examination of the weight of the right impli-

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are not, and at the same time to distinguish between coverage and protection." Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 905 (1979).

163 *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (cross burning); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (distributing religious material in airport); Cohen v. California, 403 U.S. 15 (1971) (wearing a jacket bearing the words "Fuck the Draft"); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft cards).

164 See also Justice Frankfurter's distinction between a right that is implicated and a right that is protected:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

Communist Party of the United States v. Subversive Activities Bd., 367 U.S. 1, 91 (1961).

165 *See* GREENAWALT, *supra* note 160, at 132.

cated and society's tolerance for these materials. The Court would not be able to avoid doing explicitly what it now does implicitly, that is, articulating the *value* of obscene speech under the First Amendment. In all likelihood, this would lead to the determination that obscenity is a marginal liberty concern within the First Amendment. In obscenity cases, therefore, the burden of production would be on the government and the ultimate burden of persuasion would be on the challenger. To meet its burden of production, the government would have to specifically articulate its reasons for regulating obscenity and explain the empirical connection between the regulatory means chosen and those articulated ends. Under the rational relationship test, as now applied, the government does not even have the minimal obligation to articulate a legitimate basis; as long as the Court can think of something—anything—the legislation will be upheld.[166] The challenger would subsequently bear the burden of persuasion to show, by a preponderance of the evidence, that the government's regulation was not rationally related to a legitimate state interest.

Madisonian Balancing also helps keep straight the components of constitutional analysis from case to case. For example, assume that the Court reaches the conclusion through Madisonian Balancing that obscene materials, while constituting speech, have so little value and such extraordinary potential for harm that the state is justified in prohibiting them. What happens in the next case when the speech is not obscene but merely pornographic?

In *Barnes v. Glen Theatre, Inc.*,[167] the Court considered the constitutional validity of an Indiana law barring public nudity as applied to nude dancing at the petitioner's club. The Court found nude dancing to be within the First Amendment, albeit at the margin.[168] In effect, the Court deemed the expressive component of nude dancing to have greater weight than obscenity. Yet, the Court, in an opinion by Chief Justice Rehnquist, joined only by Justices O'Connor and Kennedy, did not increase the burden of persuasion the state had to meet to justify infringing this right from that used in the obscenity context. The state bore the same burden in *Barnes* as it did in the obscenity context despite the difference in the nature and depth of the right at stake.[169]

Justice Souter, concurring, recognized the paucity of support for the infringement and wrote separately to provide an additional argument for the government's case. Souter noted that "the statute is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity.' "[170] He found that

166 *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

167 111 S. Ct. 2456 (1991).

168 *Id.* at 2460.

169 Faigman, *supra* note 13, at 1560-63.

170 111 S. Ct. at 2469 (Souter, J., concurring) (quoting Brief for Petitioners at 37, *Barnes* (No. 90-26)).

the government's burden of production was met by the severity of the prospect of harm and the general experiential basis for believing there to be a causal connection between nude dancing and crime.[171] In effect, Souter applied Madisonian Balancing in *Barnes*. Nude dancing implicated the First Amendment more deeply than obscenity, but still not fundamentally. If obscenity is a marginal right, then nude dancing might be a consequential liberty concern.[172] This consequential liberty was sufficient to shift the burden of persuasion to the state to demonstrate that there is, more likely than not, a causal connection between nude dancing and crime. The state could meet this burden by introducing empirical research from other cases indicating such a relationship.[173] Of course, if nude dancing were a central or core First Amendment right, the empirical burden would increase accordingly.

(b) Multitiered balancing tests.—Although multitiered tests are not always considered balancing decisions, in practice they function in exactly this way. In fact, as indicated by my use of *Hogan v. Mississippi College for Women* above,[174] these tests incorporate fairly well, in theory at least, the lessons of Madisonian Balancing. These tests share the same central principle of Madisonian Balancing: the Court scrutinizes the state action at a level of rigor corresponding to the constitutional significance of the right at stake. With several notable exceptions, the Court has used multitiered balancing exclusively in Equal Protection and Due Process Clause cases. These tests traditionally have not involved full balancing, for the Court has sought to categorize its scrutiny into three levels: strict scrutiny, intermediate scrutiny, and rational basis review. Adoption of Madisonian Balancing would not profoundly affect the theoretical basis of strict and intermediate review; it would, however, substantially clarify the practice under these heightened standards of review. The second part of this subsection explores heightened scrutiny review both in its strict and intermediate varieties. The insights of

171 *Id.*

172 Although the Court referred to the implicated right in *Barnes* as "marginal," *id.* at 2460, this designation might have to be reconsidered for Madisonian Balancing if obscenity were defined as a marginal right. Clearly, nude dancing more deeply implicates the First Amendment than obscenity. Logically, therefore, if obscenity is a marginal right, then nude dancing should receive the greater protection afforded by designation as a consequential right.

173 Justice Souter explained that, just as in *Renton v. Playtime Theatres*, the state "[is] not compelled to justify its restrictions by studies specifically relating to the problems that would be caused by adult theaters in that city. Rather '[the city] was entitled to rely on the experiences of . . . other cities . . . which demonstrated the harmful secondary effects correlated with the presence of even one [adult] theater in a given neighborhood.' " *Barnes*, 111 S. Ct. at 2469 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51 (1986)). As noted in the text, if a central or core liberty concern were implicated, the Court might very well require empirical proof that specifically pertains to the circumstances of the case.

174 *See supra* notes 101-14 and accompanying text.

Madisonian Balancing will have perhaps greater impact on rational basis review and so this subsection begins with this form of scrutiny.

(i) Rational basis review.—Two main issues confront the Madisonian balancer when considering cases that ordinarily would have been subjected to rational basis review and might implicate a marginal liberty concern in the present scheme. First, given the inclusive character of concepts such as due process and equal protection, what checks are available to curb the Court from finding that the Constitution is at least implicated in all cases? In other words, what is the nature of the burden of production placed upon the challenger of state action in these cases? The second issue concerns the inevitable difficulty the state would have in demonstrating the basis of its action if the balancer were to consistently require the government to actually justify its action when subjected to rational basis review. In other words, what is the nature of the burden of persuasion, if any, placed upon the government when the challenger has met her burden of production in these cases?

A potential danger in balancing is that the Court will arrogate to itself the power to supervise the judgments of the political branches. With such vague constructs as due process, it would seem, a challenger would need to do little to meet her burden of production. Once the production burden was met, the Court would then substantively evaluate the government's justification for acting. The potential for abuse, for Lochnerizing, is obvious in such a scheme. In current practice, this difficulty is sometimes remedied on the definitional side of the adjudication equation and sometimes on the application side.[175] In some cases, especially when the prospect of empirical justification appears slim, the Court determines the clause not to be implicated at all.[176] Ostensibly, the Court does not evaluate the state action in these cases.[177] Very often, however, the Court finds the state action to infringe due process or equal protection rights that are not fundamental and thus calls for merely a rational basis to support it. The Court largely evaluates state action under the rational basis test with the lights turned out.[178] In effect, rational basis review is equivalent to finding the Constitution not implicated. But if we anticipate putting teeth into rational basis review—and Madisonian Balancing anticipates doing just this—then we need to consider more seriously the question of what burden lies at the threshold of constitutional adjudication.

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175 Faigman, *supra* note 13, at 1563-65.

176 *See id.* at 1548-51 (discussing Paul v. Davis, 424 U.S. 693 (1976)).

177 In actuality, the Court is very concerned with the government interests, but assesses them at the definitional stage where the challenger bears the burden to refute them. *Id.*

178 *See* Chemerinsky, *supra* note 97, at 73 ("[Multitiered] levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests.").

The threshold burden must be ascertained by measuring how strongly the majoritarian principle outweighs the individual rights principle within the original Madisonian model. Classically, the two principles are considered virtually equal, and thus ensues the dilemma.[179] In regard to balancing individual rights against government interests, the majoritarian will is privileged because of the predominant place democratic rule occupies in the American constitutional tradition. This means that at the definitional stage the challenger must come forward with proof of the existence and scope of asserted constitutional rights. This burden is not substantial, however, for the majoritarian will supersedes individual rights only slightly at the systemic level; it is in concrete cases where the majoritarian will might prevail more strongly and this determination is made at the application stage, not the definitional stage.

In Madisonian Balancing, therefore, vague constructs such as due process and equal protection invite judicial oversight of the actions of the political branches. However, the challenger of state action still bears the responsibility for defining the scope or depth of these vague constructs. Thus, for instance, the challenger would still bear a substantial burden to persuade the Court to extend greater protection to economic rights or to extend the right of privacy to consensual homosexual behavior.[180] The challenger's success in defining the nature and scope of the particular right establishes the government's burden of persuasion to justify any infringement.

Under current practice, infringement of a nonfundamental constitutional right triggers the light scrutiny of the rational basis test. As long as the government, or the Court, can identify some legitimate government interest that is rationally related to the regulation in question, the regulation will be upheld. In very few cases does this search come up empty. Just why the Court should abdicate substantive review in these cases is not clear. If the Constitution *is* infringed, should not the Court investigate?

The conventional explanation is the system's great deference to majoritarian decisionmaking. The strength of this assumption must be evaluated. The system has a nearly equal commitment to individual liberties. Only when *no* right is implicated does the majority have unbridled discretion to act. When a right is infringed, however minimally, the state should be called upon to justify its action. Under Madisonian Balancing, when liberty is infringed only marginally, the state would be obligated to articulate the interest that motivated the complained of action and the basis for believing that that action will accomplish the claimed

179 *See* BORK (1990), *supra* note 14, at 139-41.

180 Challengers increasingly appear to be having greater success with economic rights than with privacy rights. *Compare* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) *with* Bowers v. Hardwick, 478 U.S. 186 (1986).

interest. In effect, the state would assume the burden of production to explain the basis for, and the legitimate interest in, its action.

A likely result of putting teeth into rational basis review would be to reduce the number of cases in which the Constitution is found to be implicated at all. This result should follow from a more critical and discriminating evaluation of constitutional values. In short, because Madisonian Balancing raises the stakes at the application prong, greater attention will be paid at the definition prong.

This is not a radical proposal. In the typical case involving rational basis review, the challenger will be successful in defining a liberty concern that is sufficient only to shift the burden of production to the state. The state's burden to identify a legitimate interest and articulate a rational basis for the law, in the ordinary case, will amount to little more than a pleading requirement. If the Constitution is infringed, calling upon the state to explain its action hardly seems radical.

The value of Madisonian Balancing is greatest when the liberty concern under review contains more substance but does not reach the level of heightened review called for by the standards of intermediate scrutiny or strict scrutiny. In *City of Cleburne v. Cleburne Living Center*,[181] for example, the Court invalidated, under rational basis review, a zoning ordinance requiring a special permit in order to establish a group home for the mentally disabled. The Court reached this conclusion because the record did not support the classification of this home as needing the permit as compared to others who did not need it.[182] Yet, as Justice Marshall pointed out, traditional rational basis review would not entail *actual* scrutiny of the record to determine whether the state's actions were closely tailored to its policies or whether those policies were actually supported by facts.[183] *Cleburne* is representative of a number of instances in which the Court ostensibly applied rational basis review when, in actuality, it scrutinized the government action at a heightened level.[184] The apparent explanation for these cases is the Court's desire to avoid the proliferation of cases receiving heightened scrutiny.[185] But in so doing, the Court undermines the principle supporting the framework of tiered review and sows confusion over the parameters of the test. Madisonian Balancing would permit recognition of gradations between rights, thus permitting fine adjustments in the level of scrutiny applied. In *Cleburne*, two alternative analyses might explain the result. First, if the right is only marginal, the Court might have found, after reviewing the evidence, that the challenger had demonstrated that, more likely than not, the state

181 473 U.S. 432 (1985).

182 *Id.* at 450.

183 *Id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part).

184 *See, e.g.*, Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Plyer v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982).

185 *See* TRIBE, *supra* note 26, at 1445.

action did not accomplish the articulated state purpose.[186] Alternatively, the Court could have found that the state infringed the Constitution consequentially, thus reaching the conclusion that the state should lose because it failed to produce any evidence. Madisonian Balancing, therefore, would allow the Court to continue doing what it is doing, but would require it to explain its reasons for doing so.

(ii) Heightened scrutiny review.—The primary value of Madisonian Balancing over the semiformalistic tiers of conventional equal protection and due process analysis is its flexibility in responding to hard cases. Commentators have long criticized the compartmentalized tiers of conventional analysis for the arbitrary boundaries they establish. Not all fundamental rights are equally fundamental, and thus different cases call for differing degrees of strict scrutiny. Yet, just as in the substantive rational basis review of *Cleburne*, the Court *says* it continues to review these cases under the same standard. This fact has led some to call for the abolition of a tiered review altogether and the adoption of a balancing method instead.[187] Madisonian Balancing embraces a modified tiered analysis.

In *Roe v. Wade*,[188] Justice Blackmun, writing for the Court, described the right of privacy at issue to be fundamental and, according to traditional understanding, stated that the government must demonstrate a compelling interest to justify infringements of a woman's decision to have an abortion.[189] This analysis resulted in the development of the trimester framework, which endeavored to reconcile the woman's fundamental right of reproductive choice with the government's changing interests from conception to birth. The trimester framework has not survived the test of time, or new appointments to the Court.[190] Only one member of the Court today would reaffirm *Roe* in all its particulars—Justice Blackmun, its author.[191] Four Justices, Chief Justice Rehnquist, and Justices White, Scalia, and Thomas, reject *Roe* and the trimester framework on the ground that a woman's right to an abortion is not fundamental.[192] These Justices would subject abortion regulations to, at most, rational basis review. The death knell for *Roe*'s trimester frame-

186 A third alternative explanation for the result in *Cleburne* was that the right was marginal, but the state failed to meet its burden of production to articulate a sufficient government interest. The city council in *Cleburne*, however, did articulate several government interests to support its action. 473 U.S. at 448-49 (listing concern with negative attitudes of the community, possible taunting by junior high school students going to school across the street, and the site location on "a five hundred year flood plain").

187 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). *See generally* TRIBE, *supra* note 26, at 1610 & n.65.

188 410 U.S. 113 (1973).

189 *Id.* at 154-55.

190 *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

191 *Id.* at 2843 (Blackmun, J., concurring in part and in the judgment, and dissenting in part).

192 *Id.* at 2873.

work was first sounded by Justice O'Connor in *City of Akron v. Akron Center for Reproductive Health*[193] when she called for application of the "undue burden" test.[194] Until the October 1991 term, no Justice had joined this clarion call. In *Planned Parenthood v. Casey*, however, O'Connor received the support of Justices Kennedy and Souter for a somewhat modified form of the undue burden test. For now, although it has the support of only three Justices, this test will be applied by lower courts to test the constitutionality of abortion regulations. The test, and in particular its strong factual component, provides an excellent illustration of how valuable Madisonian Balancing can be for clarifying and tightening traditional constitutional analysis.

In a rare joint opinion, Justices O'Connor, Kennedy, and Souter described the undue burden test as follows:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[195]

According to the joint opinion, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[196] The undue burden test as formulated, and as applied by the joint opinion in *Casey*, thus is principally empirically based. Before examining the operation of this fact-based test, we must step back to understand its genesis.

The undue burden test was originally formulated by Justice O'Connor in a series of concurring and dissenting opinions over the last nine years.[197] O'Connor urged this middle position and disparaged application of a compelling interest standard because of the special "nature and scope" of the abortion right.[198] In actuality, however, O'Connor has never explained why the abortion right is unique; rather, she has incorporated the strong government interests she perceives in this context to reduce the fundamental nature of the right.[199] The undue burden test

193 462 U.S. 416 (1983).

194 *Id.* at 453 (O'Connor, J., dissenting).

195 *Casey*, 112 S. Ct. at 2819.

196 *Id.* at 2820.

197 *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment); City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

198 *Akron*, 462 U.S. at 463.

199 *Id.* at 460.

results from taking stock of the government interests in regulating the right of reproductive choice in the *definition* of that right.

Because the undue burden test merges individual liberty and government interests at the definition stage, no clear burden of proof can be allocated at the application stage. Indeed, the analytical error is especially obvious in *Casey*, because of the strong empirical component of the undue burden test. The *Casey* joint opinion manifests distinct confusion over which party bears the burden to demonstrate or refute the fact that the regulation poses a substantial obstacle to the exercise of the right.

Two provisions of the Pennsylvania law illustrate the problems engendered by the undue burden test. The Pennsylvania law, among other things, imposed a 24-hour waiting period and contained a spousal notification provision.[200] The joint opinion upheld the former and invalidated the latter. On the 24-hour waiting period, the district court found that it "increas[ed] the cost and risk of abortions"[201] and was "particularly burdensome."[202] On the health risks, the joint opinion concluded, "on the record before us . . . we are not convinced that the 24-hour waiting period constitutes an undue burden."[203] It appears from the joint opinion that the burden to show a health risk was with the challenger of the statute.

In marked contrast, the Court adopted the factual findings of the district court to strike down the spousal notification provision. The joint opinion listed the scholarly research it believed indicated that "[t]he spousal notification requirement . . . does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[204] In fact, the Court went beyond the findings of the district court to cite research that was not in the record.[205] But the data and facts used to invalidate the spousal notification provision were no more valid than the data on the 24-hour waiting period.[206]

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200 *Casey*, 112 S. Ct. at 2803.

201 *Id.* at 2825 (quoting Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990)).

202 *Id.*

203 *Id.* at 2826.

204 *Id.* at 2829.

205 *Id.* at 2880 n.6 (Scalia, J., dissenting).

206 Close examination of the research studying spousal notification and the 24-hour waiting period indicates no basis for concluding that the former creates a substantial obstacle and the latter does not.

The Court relied upon the district court's detailed findings of fact regarding the effect of the spousal notification provision. *Id.* at 2826-27. The district court found that "the vast majority of women consult their husbands prior to deciding to terminate their pregnancy." 744 F. Supp. at 1360; *see also* Brief for the American Psychological Association at 7, *Casey* (No. 91-902) (citing Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 45 (1989), for the proposition that more than 92% of married women voluntarily consult with their husbands prior to having an abortion). Despite the small percentage of women likely to be affected by the provision, the lower court found that enforcing the requirement would have a "severe impact on and interfer[e] with the [woman's] abortion

The distinct impression the joint opinion gives is that the government had the burden of proof to show that spousal notification would not constitute a substantial obstacle.

The "rootless nature"[207] of the undue burden test can be given substantial grounding by use of Madisonian Balancing. Initially, Madisonian Balancing would not permit dilution of the right by appeal to the importance of the government interests at stake. The principal task is to define the nature and scope of the right of reproductive choice. In *Casey*, while four Justices believed it not to be fundamental, five members reaffirmed the "essential" holding of *Roe* that the decision to terminate a pregnancy is a fundamental right.[208] This right falls within the Due Process Clause alongside such protected areas as marriage,[209] procreation,[210]

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decision," and that, in some cases, it would "totally frustrat[e] the woman's decision to have an abortion." 744 F. Supp. at 1384-85. Given the array of evidence on the effect of the spousal notification requirement, the joint opinion concluded that it "must not blind [itself] to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." 112 S. Ct. at 2829.

The joint opinion, however, *did* blind itself to the facts surrounding the 24-hour waiting period. Based on detailed findings of fact, the district court concluded that the mandatory 24-hour waiting period "unconstitutionally imposes a legally significant burden on a woman's right to seek an abortion." 744 F. Supp. at 1378. Without specifically rejecting the lower court's factual findings, the Court reversed the lower court and held that the 24-hour waiting period did not constitute an undue burden. 112 S. Ct. at 2826.

The district court found that the waiting period would create delays that increase the health risks and economic costs of obtaining an abortion. Every woman seeking an abortion would be forced to make a minimum of two visits to an abortion provider. The court found that due to current abortion clinic practices and resources, the 24-hour waiting period would actually result in delays ranging from 48 hours to two weeks. 744 F. Supp. at 1351. The American Psychological Association, supporting the court's findings, noted that research indicates that the 24-hour mandatory waiting period imposed "an excessive burden on many women, and for some women may prevent them from receiving an abortion." Brief for the American Psychological Association at 22, *Casey* (No. 91-902). Of particular concern is the provision's effect of pushing some patients into the second trimester of their pregnancy, increasing the medical risks related to the abortion procedure. 744 F. Supp. at 1352. Expert testimony revealed that the safest time for the performance of an abortion is at eight weeks gestation. The risk of maternal death increases by approximately 50% with each additional week of gestation and the risk of health complications increase by about 30% per week. *Id.* at 1343.

Notwithstanding these factual findings, among many others, the joint opinion concluded that the 24-hour delay does not "create any appreciable health risk." 112 S. Ct. at 2825. Yet the quantum of evidence on the obstacles created by the 24-hour waiting period and the husband notification provision is virtually the same. Indeed, Justice Stevens concluded that the lower court "establish[ed] the severity of the burden that the 24-hour delay imposes on many women." *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part). Whatever the ultimate conclusions might be on the substantiality of the obstacles created by these two provisions, no reasonable fact finder could come to *different* conclusions given the evidence available.

207 *Casey*, 112 S. Ct. at 2878 (Scalia, J., dissenting).

208 *Id.* at 2804.

209 Loving v. Virginia, 388 U.S. 1 (1967).

210 Skinner v. Oklahoma, 316 U.S. 535 (1942).

contraception[211] and child rearing.[212] From the joint opinion together with the separate opinions of Justices Stevens and Blackmun, it is clear that a majority of the Court continues to interpret the *right* of reproductive choice to be at the very core of protected freedoms.

The difference between the abortion right and other similarly fundamental rights lies in the special nature of the government's interests in this area. The *Casey* joint opinion expressly found that the government's interest in promoting childbirth begins at conception.[213] Moreover, this interest increases in weight over time until at viability it is sufficient to sustain all prohibitions of abortion except where carrying the fetus to term would put the mother's life in jeopardy.[214] Thus, throughout the pregnancy, the government has a legitimate interest in promoting maternal health and an ascending interest in the life of the fetus.[215]

The differences among the five abortion-right members of the Court principally lie in their respective assessments of the government's interests in regulating abortions.[216] But these differences are more apparent than real and have been magnified by the muddled undue burden test. All five agree that the two legitimate government interests in this context are protection of maternal health and protection of the fetus. The insight of *Roe*, still recognized today, is that the strength, how *compelling* these interests are, changes throughout the pregnancy.[217] For instance, explicit in *Roe*, and implicit but clear in *Casey*, is the belief of all five Justices that the government's interest in protecting the fetus is more substantial in week eighteen than in week eight.

The undue burden test is especially unsuited for measuring government interests as they change in magnitude throughout a pregnancy. The test is a shorthand for saying that the state cannot erect a substantial obstacle to the exercise of a right. Yet, at viability, when the government's interest in protecting the fetus becomes compelling, the state can absolutely prohibit abortion—a substantial obstacle indeed. The test does not answer the question whether the *same* obstacle can be substantial in, say, week eight but not substantial in week eighteen. Given the logic of the joint opinion, depending on the time of the pregnancy, obstacles might be more or less unduly burdensome. If so, the test provides no

211 Griswold v. Connecticut, 381 U.S. 479 (1965).

212 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

213 112 S. Ct. at 2804.

214 *Id.* at 2811.

215 *Id.* at 2804.

216 The Justices might differ somewhat in their assessments of the depth of the abortion right if they examined it independently as Madisonian Balancing requires. So far, the debate centers on the government interests. Justice O'Connor has stated that she believes the abortion right is unusual, but this conclusion actually rests on the unusual government interests involved. *See supra* notes 198-99 and accompanying text.

217 *Casey*, 112 S. Ct. at 2811.

normative guidance on how to measure substantiality along a time dimension.

Madisonian Balancing also addresses the recent debate in the legal literature regarding the constitutional location of the woman's right to choose. Many legal commentators believe the right should be located in the Equal Protection Clause.[218] Because Madisonian Balancing adopts a Constitution-wide perspective, however, the Court need not specifically identify the right in the Due Process or the Equal Protection Clause. In fact, *both* clauses, as well as several others, give substance to the right. Madisonian Balancing frees the Court to examine the Constitution in its entirety to ascertain the sundry values implicated by state regulation of abortion.

Madisonian Balancing offers the abortion-right majority a common ground, if not a common answer, to the problem of reconciling a "clash of absolutes." These five Justices have all found the challenger's initial burden of production to have been met. Moreover, although there may be some disagreement about the depth or location of the right, they all accept that it is fundamental; it is either a central or core right within the Constitution. The burden of proof thus shifts to the state, and it is quite substantial. At the early stages of pregnancy, the magnitude of the government's interest in the fetus is not great, and thus obstacles that substantially interfere with the abortion right are unconstitutional. In these early stages, the empirical burden squarely rests on the government. In the early stages of a pregnancy, therefore, the 24-hour waiting period and spousal notification clearly would be invalid. As the magnitude of the state's interest in the fetus increases as the fetus grows, the state increasingly gains an interest in prohibiting all abortions. Hence, over time, the government increasingly does not have to account for any interference with the right. The burden effectively rests with the challenger to show that the state's regulation interferes with the right. At viability, however, the government's interest has reached such proportions that any rational regulations will be upheld, notwithstanding their outright prohibition of abortion.

(c) Ad hoc balancing.—Of the several balancing strategies now employed, ad hoc balancing suffers the most vehement criticism.[219] The criticisms of ad hoc balancing revolve around the Court's unfortunate tendency to weigh rights and interests without any constitutional guidelines calibrating the scales.[220] This practice results in the Court, and the courts below it, evaluating social and economic policy by their

218 *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985-86 & n.115 (1984).

219 *See, e.g.*, Frantz, *supra* note 4, at 1435; Henkin, *supra* note 3, at 1048; Aleinikoff, *supra* note 4, at 948, 980.

220 Faigman, *supra* note 13, at 1573.

own individual lights; every court brings its own peculiar myopia to the task of reading the results off the scales. This means, or at least makes it appear, that the judiciary is doing the job that is within the province or competence of the political branches.[221] The procedures of Madisonian Balancing provide substantial structure to conventional ad hoc balancing.

By this point, the application of Madisonian principles to ad hoc balancing should seem straightforward enough. In fact, ad hoc balancing differs from definitional balancing only in the level of analysis. For example, in *Mathews v. Eldridge*,[222] the paradigmatic ad hoc balancing decision,[223] the Court did not fine-tune its balance to the particulars of the case. Eldridge claimed that due process required an opportunity for an evidentiary hearing prior to the termination of Social Security disability benefits. The *Mathews* Court announced a three-part balancing test that would have courts, in each case, weigh (1) the individual right against (2) the "risk of an erroneous deprivation" and the value of alternative procedures, together with (3) the government's interest both generally and in the specific administrative alternatives.[224] In *Mathews*, however, the Court did not consider how the discontinuance of disability benefits would affect Eldridge.[225] Instead, the Court applied the *Mathews* test to the universe of disability benefits in a way that strongly resembled definitional balancing.

In other contexts, however, the Court does balance the interests in individual cases on a truly ad hoc basis. In *Maryland v. Craig*,[226] for example, the Court considered the constitutionality under the confrontation clause of a statute providing for testimony of a child witness via one-way video camera. The Court held that courts in such cases must balance the psychological effects to the individual witness against the defendant's confrontation right.[227]

Because of the close resemblance between ad hoc balancing and definitional balancing, the Madisonian model operates similarly in the two contexts. In fact, in true ad hoc balancing cases, the balance involves facts that are adjudicative in nature and thus might be traditionally understood as amenable to evidentiary procedural rules. In *Craig*, for in-

221 Henkin, *supra* note 3, at 1048.

222 424 U.S. 319 (1976).

223 *See* Aleinikoff, *supra* note 4, at 948.

224 The full statement of the *Mathews* test requires balancing of the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

225 *Id.* at 350 (Brennan, J., dissenting).

226 110 S. Ct. 3157 (1990).

227 *Id.* at 3167.

stance, the defendant's confrontation right is not going to change from case to case. The Court, therefore, with the defendant bearing the burden of production, should have assessed the nature and scope of the confrontation right.[228] This assessment would have fixed for future cases the burden of proof by which the government must prove the psychological effects on the witness of testifying face-to-face. More than any other method of constitutional adjudication, ad hoc balancing, when truly ad hoc, incorporates the two pillars of Madisonian Balancing the most concretely. Courts assess certain constitutional adjudicative facts against a pre-existing normative standard to determine whether the facts are known with sufficient confidence and demonstrate a sufficient injury.

CONCLUSION

Madisonian Balancing provides a structure within which we can "begin again a lively discussion about the fundamental principles that we believe undergird our political system."[229] The challenge for any constitutional methodology is to provide a framework in which such a "lively discussion" might take place. Reasonable observers will always disagree about the meaning and content of the Constitution; the objective of Madisonian Balancing is to focus that debate.

Madisonian Balancing rests on the essential insight that the Bill of Rights operates as a bulwark against majority tyranny. At the same time, this fact creates the danger of minority tyranny, if the Court restricts majoritarian actions too severely in the name of constitutional liberty. This Madisonian dilemma calls for a procedural mechanism to regulate the boundary between tyranny of the majority and that of the minority. Madisonian Balancing adopts an evidentiary analogue by which the concepts of burden of proof and presumptions assist the Court to sort out the respective burdens of identifying, defining, and supporting with empirical proof the sundry values and facts of constitutional adjudication.

In addition, Madisonian Balancing changes the perspective of traditional balancing methods. It calls for balancing at a transactional level of analysis. When the Court balances in the usual case, it identifies the specific rights implicated by a government action and then proceeds to compare the government's justification for that action against each right separately. Thus, the government's justification is measured at the transactional level but balanced against rights in their individual capacities. This effectively double-counts the government's interests, by allowing the same interests to defeat several rights. Madisonian Balancing proceeds on the belief that the depth of constitutional infringements change as

228 *See* Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992).

229 Aleinikoff, *supra* note 4, at 1004.

more than one right is implicated by a government action. In order to accurately compare the government's justification to the liberty effected by its action, constitutional rights must be aggregated. Madisonian Balancing, therefore, balances the full constitutional liberty concern against the complete government justification for infringing upon that liberty.